IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

BLASIUS INDUSTRIES, INC., et al.,	)	
Plaintiffs,	)	Consolidated Civil Action No. 9720
v.	)	
ATLAS CORPORATION, et al.,	)	
Defendants.	)	

DEFENDANTS' POST-TRIAL BRIEF

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NATURE AND STAGE OF PROCEEDINGS

This post-trial brief is submitted on behalf of defendants Atlas Corporation, John J. Dwyer, Edward R. Farley, Jr., Michael Bongiovanni, Richard R. Weaver, Walter G. Clinchy, Andrew Davlin, Jr., Edgar M. Masinter, John M. Devaney and Harry J. Winters, Jr. (collectively referred to as "the Atlas defendants") in this consolidated action.

In Civil Action No. 9522, plaintiff Blasius Industries, Inc. ("Blasius") commenced an action against the Atlas directors, challenging certain provisions of the Atlas By-Laws and the election of John M. Devaney and Harry J. Winters, Jr. to the Atlas Board of Directors on December 31, 1987. Only the election of Messrs. Devaney and Winters remains at issue in that action. Specifically, the issues presented to the Court on the election include:

> a) whether the action of the Atlas Board of Directors in amending the Atlas By-Laws to increase the number of members of the Atlas Board from seven to nine and electing Messrs. Devaney and Winters to fill the newly-created vacancies was valid under the business judgment rule;
>
> b) if not, whether the action was valid under the modified business judgment rule articulated in Unocal Corp. v. Mesa Petroleum Co., Del. Supr., 493 A.2d 946 (1985), because the incumbent directors, a majority of whom were "outside" directors, had reasonable grounds for believing that Blasius--and, specifically, the Blasius restructuring proposal--posed a danger to the corporate policy and effectiveness of Atlas;
>
> c) if not, whether the action was valid under the "entire fairness" review standard because it was objectively and intrinsically fair to Atlas stockholders.

In Civil Action No. 9720, petitioners Blasius, William B. Conner, Warren Delano, Jr., Harold H. George, Harold E. Hall, Michael A. Lubin, Arnold W. MacAlonan, Thomas J. Murnick and William P. Shulevitz (collectively referred to as "the Blasius petitioners") commenced a proceeding against Atlas, John M. Devaney and Harry J. Winters, Jr. pursuant to 8 Del. C. § 225 in connection with a consent solicitation conducted by Blasius.

The consent solicitation issues raised in that action include:

(a) whether the results of the consent solicitation as reported in the Certification of the Independent Judges of Stockholders' Votes, which concluded that none of the five proposals for which Blasius solicited consents had received the consent of the holders of a majority of the outstanding shares of Atlas common stock, should be disturbed;

(b) whether consents delivered in favor of Blasius Proposal 3, which called for Atlas stockholders to approve a resolution that would remove without cause John M. Devaney and Harry J. Winters, Jr. from the Atlas Board of Directors, are null and void because the removal without cause of directors of a classified board is not an action that may be taken at an annual or special meeting of Atlas stockholders, as required by 8 Del. C. § 228(a); and

(c) whether consents delivered to Atlas in favor of Blasius Proposals 2 and 4 on March 6, 1988 are null and void because Blasius delivered to Atlas on December 30, 1987, a consent that contained proposals that are identical to Blasius Proposals 2 and 4 and, therefore, the sixty-day period provided for in 8 Del. C. § 228(c) commenced to run as to those proposals on December 30, 1987 and expired prior to the delivery of a sufficient number of consents.

A trial in this action was held on May 2-3, 1988. Four Atlas directors, Edward R. Farley, Jr., Michael Bongiovanni, Richard R. Weaver and Edgar M. Masinter, and a representative from Atlas' financial advisor, Goldman, Sachs & Co., testified at trial. In addition, certain deposition testimony and exhibits were also received in evidence. No one from Blasius testified. Blasius declined to produce any testimony, live or by deposition, by any Blasius director, officer or employee or an expert on any issue, including specifically the implications for Atlas and its stockholders of the Blasius restructuring proposal which is at the center of this dispute.

SUMMARY OF ARGUMENT

First, John M. Devaney and Harry J. Winters, Jr. were validly elected to the Atlas Board of Directors on December 31, 1987, when the Atlas Board amended the Atlas By-Laws to increase the size of the board from seven to nine members and unanimously elected Messrs. Devaney and Winters to fill these newly-created positions.

In electing two additional directors, the Atlas Board neither engaged in self-dealing nor entrenched itself in office. Moreover, the Atlas Board acted with substantive and procedural due care, and it took the challenged action for a rational business purpose. Thus, the Board's action should be upheld under the business judgment rule.

Even if a pure business judgment analysis were held not to be applicable to the action taken by the Atlas Board, the Board's action should still be upheld under the modified business judgment rule articulated in Unocal Corp. v. Mesa Petroleum Co., Del. Supr., 493 A.2d 946 (1985). The incumbent directors, a majority of whom were non-management, "outside" directors, had reasonable grounds for believing that Blasius -- and, specifically, the Blasius restructuring proposal -- posed a danger to the corporate policy and effectiveness of Atlas. Moreover, the election of two directors to this staggered Board, one-third of which would be up for re-election at the next annual meeting in November 1988, was a modest and

restrained action when compared to the devastating effect the Blasius proposal would have upon Atlas stockholders.

Indeed, even under the "entire fairness" review standard, the action of the Atlas Board should be upheld because it was objectively and intrinsically fair to Atlas stockholders. Messrs. Devaney and Winters were highly qualified and filled specific needs on the Atlas Board, and the Blasius restructuring proposal was not in the best interest of Atlas or its stockholders.

Second, on March 22, 1988, the Independent Judges of Stockholders' Votes certified the results of the Blasius consent solicitation. According to that certification, none of the five proposals for which Blasius solicited consents received a sufficient number of consents. This result should not be disturbed.

Blasius would urge this Court to adopt a rule of law that would cause it to intervene to change the result by considering only extrinsic evidence offered in favor of Blasius and then to halt suddenly and artificially any and all further inquiry no matter how inequitable the result. This Court should not admit extrinsic evidence in this case where there is no suggestion that the independent inspectors acted other than in good faith. However, if it were to consider extrinsic evidence, then it should do so only in a manner designed to ensure that the true intent of Atlas stockholders is accurately reflected and not limit the record in the artificial and inequitable manner proposed by Blasius.

Third, Blasius Proposal 3 must fail as a matter of law because the solicitation of consents pursuant to 8 Del. C. § 228(a) is expressly limited to those actions that may be taken at an annual or special meeting of stockholders. The removal without cause of directors elected to a classified board is not such an action. Only when the certificate of incorporation "otherwise provides," 8 Del. C. § 141(k), may directors of a classified board be removed without cause. The Atlas Certificate of Incorporation, however, does not otherwise provide.

Fourth, Blasius Proposals 2 and 4 also fail as a matter of law because the consents delivered by the Blasius petitioners on March 6, 1988 in favor of those proposals were untimely. Blasius had delivered a first consent that contained those identical proposals on December 30, 1987, starting the sixty day time period provided for in 8 Del. C. § 228(c) within which the required number of consents to effect those proposals had to be delivered. That time expired no later than February 28. Thus, the sixty day time period for the validity of the action referred to in Proposals 2 and 4 had expired prior to the March 6, 1988 delivery of consents by Blasius. Otherwise, permitting a second duplicative consent to extend the 60 day time limit fixed by § 228(c) would eviscerate this statutory requirement.

STATEMENT OF FACTS

Atlas is a Delaware corporation with its principal place of business in Princeton, New Jersey. (Complaint, ¶ 2.) In 1986, Atlas had five divisions--Brockton Sole and Plastics, Atlas Building Systems, International Atlas Services, Western Sky Industries and Atlas Minerals. (PX 13, p. 11; Tr. 100A.[1/]) Recognizing that several of its non-mineral divisions were faced with difficult times and the uncertainty that surrounded the company's once vital domestic uranium operations, Atlas developed and began to implement a restructuring program designed to exploit its strength in the natural resources industry with the exploration and production of minerals. (PX 13, p. 11; Tr. at 30A, 28B.) Thus, Atlas set as its goal to become a natural resources company with its principal focus on the mining and production of gold. (PX 13, p. 11.)

To implement that strategy, Atlas studied its various divisions and identified those that were not well positioned for the future. It decided to raise the capital necessary for its gold operations by selling all but two of its existing divisions, Atlas Minerals and Atlas Building Systems. (PX 13, pp. 11-12; Tr. at 30-32A, 100A.) Moreover, because of the problems faced by domestic uranium producers, such as Atlas, it announced on September 1, 1987, that it was permanently closing its uranium operations. This resulted in a one-time charge

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1/ Transcript references to "A" pages refer to Volume I of the Trial Record; transcript references to "B" pages refer to Volume II of the Trial Record.

against earnings of $52.3 million. (PX 13, pp. 12-13; Tr. at 30A.) As of the Fall of 1987, Atlas' restructuring efforts had transformed the company into a modestly successful gold company with a hopeful future. (PX 13, p. 13; Tr. at 33A.)

As a result of this fundamental change in the direction of Atlas, the Board had reached a clear consensus by mid-1987 that it should expand its size to add expertise and competence in what had only recently become its principal operation, namely the mining and milling of gold. (Tr. at 32-34A, 40-41A, 92-93A, 117A, 27-32B.) However, the Board decided to delay implementation of that decision until after the write-off of Atlas' uranium operations believing it would be unwise to ask individuals who were not familiar with Atlas to be responsible for such dramatic decisions. (Tr. at 119-20A.)

Reacting to the restructuring efforts that had been implemented over the last year, in the Fall of 1987 the price of Atlas common stock traded in the range of $50. (Tr. at 105A.) After the stock market crash in mid-October, however, the price of Atlas stock fell dramatically to the $20s. (Tr. at 105A.) Apparently attempting to exploit the opportunity to make a quick profit by purchasing Atlas stock cheaply, Blasius bought the bulk of the Atlas stock it holds in the wake of the October crash when the stock traded at depressed prices. (DX C.)

On October 29, 1987, Blasius and certain other persons filed a Schedule 13D with the Securities and Exchange Commission ("SEC"), announcing for the first time that they

controlled approximately 9.1% of the outstanding common stock of Atlas. (DX C.) Blasius delivered a copy of its Schedule 13D to Atlas the next day. (DX C; p. 1; Tr. at 106A.) In the Schedule 13D, Blasius reported that the purpose of the recent purchase of Atlas stock was "with a view toward making a profit". (DX C, p. 13.) Blasius also disclosed that it was exploring the feasibility of obtaining control of Atlas, including the possibility of making a tender offer or seeking "appropriate" representation on the Atlas Board of Directors. (DX C, p. 14.) Blasius also noted that "it is anticipated that certain properties and businesses of [Atlas] would be sold or otherwise disposed of" if it were to take control of Atlas. (DX C, p. 15.) Finally, Blasius reported that it "may also dispose of all or a portion of the shares [it had purchased] in the open market, in privately negotiated transactions, or otherwise". (DX C, p. 15.)

As a result of the public filing, Atlas began to collect information concerning Blasius and its investor-principals, Messrs. Lubin and Delano.2/ (Tr. at 38-41B.) The publicly available information on Blasius revealed that Blasius was in desperate need of immediate cash to service an enormous debt burden. Blasius had marginal business operations and had

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2/ Although Mr. Weaver, Atlas' President and Chief Executive Officer, met with representatives of Goldman Sachs & Co., Atlas' financial advisor, to consider this development and during the conversation discussed the possibility of taking some action to dilute the interest of existing Atlas stockholders (PX 20A), at no time between October 1987 and the present date has Atlas diluted the interest held by Blasius or any other Atlas stockholder. (Tr. at 111-12A.)

recently incurred an enormous debt by the sale of junk bonds. (Tr. at 40-41B.) In a Form 10-K filed by Blasius with the SEC on August 31, 1987, Blasius stated:

> Funds generated by [Blasius'] existing operations presently are not at a level sufficient to enable [Blasius] to meet its debt service obligations on the $59,000,000 principal amount of its Notes and other fixed charges. . . . [Blasius] may use additional borrowed funds in connection with its acquisition activities. Money borrowed by [Blasius] will be subject to interest costs that may or may not be covered by the earnings or cash flow from businesses acquired by [Blasius].

(DX AA, p. 15; Tr. at 44-46B.) Moreover, the publicly available information indicated that Blasius might possibly be an unregistered investment company under the Investment Company Act of 1940 by reason of the large securities holdings that comprised the bulk of its assets at that time. (Tr. at 44B.) It was also learned that previously Lubin and Delano had ostensibly tried to achieve leveraged buyouts but had closed no such transactions. (Tr. at 48-49B.) Blasius' precarious financial condition and the backgrounds of its principals were reviewed at the Atlas Board meeting held on December 2, 1988. (Tr. at 56-57B.)

At the request of Lubin and Delano, Atlas representatives (its chief executive officer, its chief financial officer, its legal counsel and outside director, and a representative of its financial advisor) met with Blasius representatives after the Board meeting on December 2, 1987. (Tr. at 113A.) At the meeting, Lubin and Delano presented orally an unsolicited restructuring proposal for Atlas. (Tr. at 113-14A.) After the meeting, the Atlas representatives

considered what they had heard and were unanimous in their view that the proposal simply could not work. (Tr. at 58B.) At that time, Matthew Czjakowski of Goldman Sachs conveyed his initial view that the proposal was not realistic for Atlas. (Tr. at 59B, 62-63B.) Despite the fact that no one saw even the slightest feasibility for the Blasius restructuring proposal, it was still decided that Goldman Sachs would conduct a detailed review and analysis of the proposal and Atlas management immediately began to provide the information necessary for that evaluation. (Tr. at 151A, 65-66B.)

By letter dated December 7, 1987, Lubin sent to Atlas the written version of the proposal he had delivered orally on December 2, 1987. (DX H; Tr. at 114A.) In his letter, Lubin purported to provide a "detailed description" of Blasius' proposal for "a possible financial restructuring" of Atlas. (DX H.) In fact, the proposal called for nothing more than a substantial liquidation of the company. (Tr. at 151A.)

As stated in the letter, the Blasius restructuring proposal included the following: (1) an initial special cash dividend to Atlas' stockholders in an aggregate amount equal to (a) $35,000,000, (b) the aggregate proceeds to Atlas from the exercise of option warrants and stock options, and (c) the proceeds from the sale or disposal of all of Atlas' operations that are not related to its continuing minerals operations, (2) a special non-cash dividend to Atlas' stockholders of an aggregate $125,000,000 principal amount of Atlas Gold Corporation 7% Secured Subordinated Gold-Indexed Debentures.

In addition to the proceeds that may be obtained from the exercise of option warrants and stock options, the funds necessary to pay the initial cash dividend would purportedly come from (i) a "gold loan" in the amount of $35,625,000, repayable over a three to five year period and representing 75,000 ounces of gold at a price of $475 per ounce, (ii) the proceeds from the sale of the discontinued Brockton Sole and Plastics and Ready-Mix Concrete businesses, and (iii) the January 1988 sale of uranium to the Public Service Electric & Gas Company. (DX H.)

Significantly, the December 7 letter also represented that Atlas stockholders would receive total special dividends of between $50.52 - $56.89 per share. (DX H.) Only after Atlas commenced a lawsuit in the United States District Court for the District of Delaware (Longobardi, J.) and alleged that Blasius had committed certain violations of the federal securities laws did Blasius concede that (i) "following the payment of the Special Dividends to Atlas stockholders, the Common Stock will have a market price that will be less than the current market price", (ii) it was "possible" that the debenture component of the Special Dividends "will trade at a substantial discount", and (iii) "it is a possibility" that "the aggregate market value of the Special Dividends and the residual Common Stock may be less that the current market value of the Common Stock." (DX VVV; see also Tr. at 132-33A, 140A.)

Blasius filed an Amendment No. 1 to its Schedule 13D, dated December 7, 1987, and reported publicly that it had met

with representatives of Atlas and had presented a written restructuring proposal for the company. Blasius included a copy of its December 7 letter in its public filing with the SEC. (PX 4.)

On December 9, 1987, each member of the Atlas Board was given a copy of the Blasius December 7 letter, containing the details of its restructuring proposal. (DX H; Tr. at 44-50A, 77-78A.) The Board was informed at that time that Goldman Sachs had commenced a detailed review and analysis of the proposal. (DX H, p. 1; Tr. at 79A.) In addition, each of the directors reviewed a press release issued that day by Richard R. Weaver, President and Chief Executive Officer of Atlas, after he had conferred with both Goldman Sachs and certain outside directors, concerning the Blasius proposal. (DX H, p. 9; Tr. at 77A, 123A, 81-82B, 186-87B.)

In the press release, Mr. Weaver expressed his surprise that Blasius would suggest using debt to accomplish what would be a substantial liquidation of Atlas at a time when Atlas' future prospects were so promising. He noted that the Blasius proposal recommended that Atlas incur a high debt burden in order to pay a substantial one time dividend consisting of $35 million in cash and $125 million in subordinated debentures. Mr. Weaver also questioned the wisdom of incurring an enormous debt burden amidst the uncertainty in the financial markets that existed in the aftermath of the October crash. (DX H, p. 9.)

Beginning immediately after their receipt of the written Blasius restructuring proposal, all members of the Atlas Board reviewed the proposal with care and concluded that it was not appropriate for Atlas and that its implementation was not in the best interest of the company's stockholders. (Tr. at 44-50A, 88-91A, 132A-33A, 144-51A, 156-57A, 66-72B, 88B.) Goldman Sachs, which knew Atlas' current financial situation intimately based on its work for the company during the prior several months (Tr. at 131-40B; DX D), viewed the proposal as unworkable. (Tr. at 52A, 80A, 147A, 151A, 144-48B, 157-62B.) Goldman Sachs was scheduled to present its analysis of the Blasius proposal at the company's Board meeting scheduled for January 6, 1988. (Tr. at 92A.)

Throughout the month of December, Atlas generated additional financial information for Goldman Sachs to use in its analysis. (Tr. at 148-50B.) There were ongoing discussions throughout December between Atlas and Goldman Sachs to develop reliable and fair projections of Atlas operations. (Tr. at 153-56A, 148-50B.) All indications throughout December were that the Blasius restructuring proposal was grossly inappropriate for a gold company such as Atlas under any set of assumptions. (Tr. at 80A, 144-48B, 157-62B.) Lubin asked to meet again with Atlas in late December, but Atlas informed him that Atlas' analysis of the Blasius proposal was ongoing, and that with the Christmas and New Years holidays fast

approaching, the meeting should be scheduled for sometime after January 1, 1988. (Tr. at 125A-28A.)[3/]

Blasius, however, short circuited the process. Late in the day on December 30, 1987, Blasius delivered a consent to Atlas, demanded a shareholder list in order to commence a consent solicitation, and told Atlas that it had commenced an action in Delaware Chancery Court. Blasius refused, however, to inform Atlas' outside counsel what relief the lawsuit sought. (PX 59; Tr. at 130-31A, 17B, 84B.)

More specifically, Blasius caused Cede & Co. to deliver to Atlas a consent with respect to 10,000 shares of Atlas common stock of which Cede & Co. was the record holder and Blasius was the beneficial owner, in favor of certain actions, including the expansion of the size of the Atlas Board from seven to fifteen members, the election of eight Blasius nominees to the Atlas Board and the adoption of the Blasius restructuring proposal. (PX 3, pp. 9-11.)

Surprised by the series of actions taken by Blasius at the start of the holiday weekend and concerned as to what future actions Blasius might secretly be ready to launch (including an additional lawsuit that would seek to freeze the Atlas Board from taking any action otherwise available to it), Atlas promptly sought to convene its Board on the evening of December 30 to apprise it of these developments. (Tr. at 15-

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3/ Although Lubin told Mr. Weaver during this period that Blasius might lighten its restructuring proposal, Blasius never did so. (Tr. at 127-28A.)

17B, 19-20B, 83-85B, 91B.) There was no meeting, however, because three of the outside directors could not be located and a fourth director's telephone connection was too poor to participate in a discussion. (Tr. at 13A, 134A.) All agreed to attempt to reconvene the following morning. (Tr. at 21B.)

In the interim, Atlas received Blasius' Amendment No. 2 to its Schedule 13D dated December 30. There, Blasius announced that it intended

> to undertake a solicitation of written consents from [Atlas'] stockholders pursuant to which consents will be solicited to (1) adopt a precatory resolution requesting and recommending that [Atlas'] board of Directors promptly develop and implement a restructuring program in a form similar to the [Blasius] Restructuring Proposal, (2) amend the By-laws of [Atlas] to, among other things, expand the size of [Atlas'] Board of Directors from seven members to fifteen . . ., and (3) elect eight nominees of Blasius to fill the eight newly created directorships.

(PX 59, p. 6.) Included in Blasius' filing was the December 7 letter and its representation that the Blasius restructuring proposal would result in Atlas stockholders receiving total special dividends of between $50.52-$56.89 per share. (PX 59.) The falsity of that statement was of concern to Mr. Weaver, who believed Atlas stockholders were being misled by Blasius. He explained his concern at trial:

> "In my mind at that time it really wasn't the control of the Atlas Board that really concerned me. I was more concerned with the Blasius proposal and how unfair it could really be to the shareholders unless it was explained in great detail and they understood they weren't looking at a $50 to $56 payout; it may be a heck of a lot less than that and may be 50 percent of that, and the consent that was delivered to Atlas on the 30th, those points were never brought out. They were never explained, and they were never shown. And I really felt that,

> knowing what I did about the economics of that proposal after looking at it for three weeks, the shareholders were going to end up with the stick end of the lollipop."

(Tr. at 140A.)

It was with that background that, on December 31, 1987, the entire Atlas Board held a special meeting to consider the events of December 30. Messrs. Weaver, Bongiovanni, Clinchy, Davlin, Dwyer, Farley and Masinter participated. (PX 5.) All of the directors except for Mr. Weaver, who was President and Chief Executive Officer of Atlas, and Mr. Farley, who upon his retirement from Atlas in 1987 entered into a consulting agreement with the company, were independent, "outside" directors. (PX 7, pp. 3-4; Tr. at 34-36A.) Mr. Masinter, an outside director and legal counsel to Atlas who led the meeting, reviewed with the Board the various proposals for which Blasius would solicit consents, including the Blasius restructuring proposal. (Tr. at 17A, 19A, 28A, 82-83A, 135A, 21-23B, 88-90B, 102B.) Mr. Masinter's report was "discussed extensively." (PX 5.)

Prior to the meeting, each director was well acquainted with the Blasius restructuring proposal, having received it on or about December 9, 1987. (DX H.) Each independently had concluded that it was not in the best interests of Atlas' stockholders. (Tr. at 44-50A, 88-91A, 132-33A, 144-51A, 156-57A, 66-72B, 88B.) Each also understood that although Goldman Sachs was still reviewing it in detail and would make a formal presentation at the regular Board meeting scheduled for January 6, 1988, all indications from Goldman

Sachs at the time were that the proposal was unworkable. (Tr. at 52A, 80A, 84A, 105B, 144-48B, 157-62B, 183-86B.) Each also understood, for reasons totally unrelated to Blasius and in accordance with plans made before Blasius delivered its consent, that in conjunction with the January 6 meeting the Board was already planning to expand its size and elect an additional director. (Tr. at 37-41A, 85A, 93A, 130A, 26-27B, 32-34B; DX I.) Indeed, discussions directed at bringing Mr. Winters onto the Atlas Board had been in progress during the prior year. More particularly, Mr. Winters was contacted in early December by Mr. Weaver to arrange for a meeting with the Atlas Board in conjunction with the regularly scheduled January 6 Board meeting. (Tr. at 116-17A, 121A.) Finally, Mr. Winters curriculum vitae had been provided to the Board on December 24, 1987, together with a cover memorandum setting the stage for his election at the January 6 Board meeting. (DX I.)

As Richard Weaver testified, when considering the strategy for responding to the consent Blasius had delivered on December 30:

> "We talked about taking no action. We talked about adding one board member. We talked about adding two board members. We talked about adding eight board members. And we did a lot of looking at other and various and sundry alternatives, and after a lengthy discussion we concluded that the best action for us to take is not to change our game plan. Let's go forward with the director and/or directors that would best fit on the Atlas board that would round out our board and the mining and financial part of our business, and only do that. That's what we had started. That's where our thoughts were, and that's what we were going to do."

(Tr. at 130A.) And as Mr. Bongiovanni echoed:

> "We were merely going ahead with our plans. Our plans for the restructuring of the company started long before Blasius ever came into the picture. My personal feeling was that they were sort of interrupting and they were trying to abort our plans. And we weren't trying to thwart their plans. We were merely trying to bring our plans to fruition."

(Tr. at 84A.)

Thus, at the December 31 meeting, the Atlas Board voted unanimously to amend the Atlas By-Laws to increase the number of directors from seven to nine and elected John M. Devaney and Harry J. Winters, Jr. to the Board. (PX 5.) As stated, prior to any of the actions taken by Blasius on December 30, and prior to Blasius filing its original Schedule 13D, the election of Messrs. Devaney and Winters to the Atlas Board had been under consideration. (Tr. at 37-43A, 87A, 95A; DX I.) Mr. Devaney was and remains Atlas' Chief Financial Officer and was intimately familiar with the company. At the time of his election to the Atlas Board, he had been with Atlas for 20 years and served as Vice President Finance, Treasurer and Chief Financial Officer. He is a Certified Public Accountant in the State of New York, and is a member of the American Institute of Certified Public Accountants, the New York State Society of C.P.A.s and the Tax Executive Institute. (PX 14.)

Mr. Winters is a gold mining consultant with a world-wide reputation, who had consulted for the company in the past, and whose background and expertise were considered important by the Atlas Board at a time when the company had only recently undergone a restructuring and became a gold mining company. He

is a director of American Gold Resources Corporation and a former director of Baker Mining Equipment Company. Mr. Winters had previously served as President of Pincock, Allen & Holt, Inc., an international mineral engineering firm and was vice president of McPhar Geophysics. He holds Ph.D. and M.S. degrees in Geological Engineering from the University of Arizona. Mr. Winters is a Registered Professional Engineer in Arizona, a member of the American Institute of Mining, Metallurgical and Petroleum Engineers, the Mining and Metallurgical Society of America, the Canadian Institute of Mining and Metallurgy, and the Arizona Geological Society. (PX 14; Tr. at 158-59A.)

At a regular meeting of the Atlas Board of Directors held on January 6, 1988, the Board reviewed and analyzed the Blasius restructuring proposal with the advice of its financial advisor, Goldman Sachs. The Goldman Sachs presentation included a summary of five year cumulative cash flows measured against a base case and the Blasius proposal, an analysis of Atlas' debt repayment capacity under the Blasius proposal, and pro forma income and cash flow statements for a base case and the Blasius proposal assuming $375, $475 and $575 per ounce of gold. (DX K; DX L; Tr. at 67-69A, 157A, 164-82B.)

After completing that presentation, Goldman Sachs stated that the conclusions that it thought were apparent from the analysis were that if Atlas implemented the Blasius restructuring proposal (i) a severe drain on operating cash flow would result, (ii) Atlas would be unable to service its

long-term debt and could end up in bankruptcy; (iii) the Common Stock of Atlas would have little or no value, and (iv) since Atlas would be unable to generate sufficient cash to service its debt, the debentures contemplated to be issued in the proposed restructuring could have a value of only 20% to 30% of their face amount. Goldman Sachs also said that it knew of no financial restructuring that had been undertaken by a company where the company had no chance of repaying its debt, which in its judgment would be Atlas' situation if it implemented the Blasius restructuring proposal. Finally, Goldman Sachs noted that if Atlas made a meaningful commercial discovery of gold after implementation of the Blasius restructuring proposal, Atlas would not have the resources to develop the discovery. (DX K, p. 4; see also Tr. at 92-93B, 95B, 182-86B.) While Goldman Sachs did not make its comprehensive presentation until January 6 (DX K), its essential conclusions had all been conveyed to Atlas' management before December 31. (Tr. 182-86B.)

After a review of the Goldman Sachs presentation, the Board concluded at that time and informed Blasius that it had rejected the Blasius restructuring proposal because it was wholly unrealistic and, if implemented, could cause the bankruptcy of Atlas. (DX K.)

On January 7, 1988, Blasius caused Cede & Co. to deliver to Atlas a second consent with respect to 1,000 shares of Atlas common stock in favor of certain of the actions already set forth in the December 30, 1987 consent, as well as

the removal without cause of Messrs. Devaney and Winters and the election of Blasius nominees to fill any vacancies on the Atlas Board if Messrs. Devaney and Winters were found to have been validly elected to the Atlas Board and could not be removed without cause. (DX X.)

By consent solicitation material dated February 1, 1988, Blasius sought written consents from Atlas stockholders in favor of five proposals. Proposal 1 called for the adoption of a non-binding resolution that requested that the Atlas Board promptly develop and implement the restructuring program proposed by Blasius in its December 7 letter or enter into a transaction for the sale of Atlas or substantially all of its assets at an aggregate price of not less that $50 per share. Proposal 2 sought Atlas stockholder consent to amend Sections 11 and 12 of the Atlas By-Laws in certain respects, including the expansion of the Atlas Board from seven to fifteen members. Proposal 3 called for Atlas stockholder approval to remove without cause Messrs. Devaney and Winters as directors of Atlas. Proposal 4 called for the election of eight Blasius nominees to the Atlas Board. And Proposal 5 called for the election of Blasius nominees to fill whatever vacancies remained on the Atlas Board if Messrs. Devaney and Winters were held to have been validly elected and could not be removed without cause. (DX VVV.)

On March 7, 1988, Atlas received, at the office of its registered agent in Delaware, written consents delivered by Blasius and claimed by it to be sufficient to take the various

actions set forth in its consent solicitation. Immediately thereafter, Atlas provided the delivered consents to the independent inspectors of the election, Manufacturers Hanover Trust Company, so that the inspectors could commence their tabulation. The independent inspectors permitted both Atlas and Blasius, their counsel and the solicitation organizations which had assisted them, to review the consent and revocation cards that had been submitted. That review took nearly a week. After the parties had completed their review, the independent inspectors provided the parties an opportunity to present challenges to their tabulation of votes. The independent inspectors took these challenges under advisement and conferred with their own counsel. Blasius and Atlas were also afforded the opportunity to present their views on all issues to the inspectors' counsel, and both did so.

On March 22, 1988, the independent inspectors issued a Certificate of Independent Judges of Stockholders' Votes, which reported that Blasius had not received the requisite number of consents for any of the five proposals for which consents were solicited. (DX EEEE.)

Argument

POINT I

MESSRS. DEVANEY AND WINTERS WERE VALIDLY ELECTED TO THE ATLAS BOARD OF DIRECTORS

A. Introduction

As this Court explained in AC Acquisitions Corp. v. Anderson, Clayton & Co., Del. Ch., 519 A.2d 103, 111 (1986) (Allen, C.), the actions of a corporation's board of directors are analyzed under one of three levels of scrutiny: (i) the deferential review mandated by the business judgment rule; (ii) the "intermediate form of judicial review" defined in Unocal Corp. v. Mesa Petroleum Co., Del. Supr., 493 A.2d 946 (1985); or (iii) the more exacting "entire fairness" review of Weinberger v. UOP, Inc., Del. Supr., 457 A.2d 701 (1983). Here, the actions of the Atlas Board should be judged under the first of those standards and, if more stringent scrutiny is called for (which it is not), the Unocal standard should govern. Moreover, no matter what level of scrutiny is applied, the challenged actions should be upheld.

Blasius, however, would ignore controlling precedent and urge that a fourth type of scrutiny exists: a per se rule that if a Board takes "any action" allegedly interfering with the corporate democratic process, Petitioners' Pretrial Memorandum ("Petitioners' Mem.") at 22, that action will be subjected to an unidentified form of "heightened [judicial]

scrutiny." Id. at 26. Blasius' argument is based on a misreading of Schnell v. Chris-Craft Industries, Inc., Del. Supr., 285 A.2d 437 (1971) and its progeny. The rule Blasius proposes simply is not the law, and should not be the law.

B. The Conduct of the Atlas Directors Should Be Upheld Under the Business Judgment Rule

The actions of a board of directors are reviewed under the deferential business judgment rule unless the party challenging the board's conduct can demonstrate (i) that the directors' conduct furthered the directors' financial interest or entrenched the directors in office; or (ii) that the directors failed to exercise proper business judgment in approving the challenged transaction. Grobow v. Perot, Del. Supr., 539 A.2d 180, 186-91 (1988). The rule mandates that a board's action will be upheld if that action "can be 'attributed to any rational business purpose.' Sinclair Oil Corp. v. Levien, Del. Supr., 280 A.2d 717, 720 (1971)," Unocal, 493 A.2d at 954. Blasius, however, has failed to show that the business judgment rule does not apply to this case or that the challenged actions of the Atlas Board do not pass muster under the rule. Indeed, despite its repeated assertions that the Atlas directors "entrenched" themselves, Blasius simply has not demonstrated that the actions taken by the Atlas directors in any way strengthened those directors' tenure in office.

1. The Atlas Directors Were Not Self-Dealing

Blasius failed to make the first showing required by Grobow: it has not shown that the actions taken by the Atlas Board furthered the Atlas directors' financial interest or entrenched those directors in office. In fact, Blasius did not even hint that the Atlas directors obtained any personal financial gain from the actions they took on December 31. Rather, Blasius baldly asserts that the Atlas directors "entrenched" themselves. To prove entrenchment, however, Blasius must show "that the [defendant] directors' positions were actually threatened," and that the directors' actions were "motivated and reasonably related to the directors' retention of their positions on the Board." Grobow, 539 A.2d at 188. Blasius has not done so.

First, Blasius introduced no evidence that the Atlas directors acted out of a desire to retain "their positions on the Board." Every director called at trial testified that he voted on December 31 to elect Winters and Devaney because: (i) Winters and Devaney were highly qualified candidates who added needed expertise to the Board; (ii) the Board had already decided to expand the size of the Board before Blasius filed its Schedule 13D first identifying itself as a stockholder; and (iii) the election of the two new directors had the limited effect of slowing the implementation of Blasius' proposal for the restructuring of Atlas, which all members of the Board firmly believed was not in the best interest of Atlas or its

stockholders. (Tr. at 54-55A, 83-85A, 87A, 116-19A, 122-23A, 130A, 132-33A, 140A, 144-58A, 26-35B, 59-71B, 158-159B.)

Second, Blasius introduced no evidence suggesting that the Atlas directors' positions on the Board were actually threatened by Blasius' actions or that the actions taken by the Atlas directors were "reasonably related to retention of their positions on the Board." Indeed, Blasius' December 30 consent did not seek to unseat any of the directors. Moreover, as demonstrated in Point III, incumbent directors cannot be removed without cause.

Undaunted, Blasius argues that the Atlas directors "entrenched" themselves by retaining "control" of the Board, i.e. by acting to ensure that they remained part of the Board's ruling majority. Blasius' proffered view of "entrenchment" is wrong: the Supreme Court has already adopted a narrower definition in Grobow. In fact, every Delaware case to hold that directors "entrenched" themselves has concerned directors acting to preserve their seats on the board. See, e.g., Schnell, 285 A.2d at 439 (directors attempted to "utilize the corporate machinery and the Delaware law for the purpose of perpetuating itself in office" by opposing dissident shareholders' efforts to elect a rival slate of directors to replace incumbent board); Giuricich v. Emtrol Corp., Del. Supr., 449 A.2d 232 (1982) (incumbent directors maintain shareholder deadlock in order to indefinitely prevent election of successor directors); Lerman v. Diagnostic Data, Inc., Del. Ch., 421 A.2d 906 (1980) (incumbent directors oppose effort by

shareholders to replace incumbents with a slate of rival directors); Aprahamian v. HBO & Co., Del. Ch., 531 A.2d 1204 (1987) (incumbent directors oppose efforts by shareholders to replace incumbents with rival slate of directors); Mesa Petroleum Co. v. Unocal Corp., Del. Ch., C.A. No. 7997, slip op. at 4, Berger, V.C. (Apr. 22, 1985) (directors oppose effort of dissident shareholder to postpone election of board until dissident has obtained control of majority of company's stock).

Indeed, Blasius' view of entrenchment (if applied to this case) would effectively erase the business judgment rule. The rule applies unless the directors derive some benefit from their actions which does "not devolve upon the corporation and the shareholders generally," Ivanhoe Partners v. Newmont Mining Corp., Del. Supr., 535 A.2d 1334, 1341 (1987). Accordingly, directors who merely implement their view of what is best for their corporation are protected by the rule. Grobow, 539 A.2d at 190 (board acts with legitimate business purpose if it eliminates dissident shareholder in order to "rid itself of the principal cause of the growing internal policy dispute" within the corporation).

Here, Blasius did not show that the Atlas directors maintained "control" in order to make their seats on the Board more secure or to receive personal financial gain.4/

4/ Blasius cannot, of course, argue that the Atlas directors' positions were threatened because Blasius intended to implement a restructuring proposal that would have bankrupted Atlas without conceding that the Blasius proposal was not in the best interest of Atlas or its shareholders and that the Atlas Board, therefore, acted properly in opposing it.

Accordingly, the only conceivable personal benefit the directors could have received from their actions was the emotional satisfaction of being a member of the Board's "ruling clique." If the mere possibility such an emotion exists rises "to the level of a disqualifying interest," Unocal, 493 A.2d at 957, no corporate action is protected. As this court observed in Moran v. Household Intern., Inc., Del. Ch., 490 A.2d 1059, 1074, aff'd, Del. Supr., 500 A.2d 1346 (1985) (citations omitted):

> "'It is frequently said that directors are fiduciaries. Although this statement is true in some senses, it is also obvious that if directors were held to the same standard as ordinary fiduciaries the corporation could not conduct business. For example, an ordinary fiduciary may not have the slightest conflict of interest in any transaction he undertakes on behalf of the trust. Yet by the very nature of corporate life a director has a certain amount of self-interest in everything he does. The very fact that the director wants to enhance corporate profits is in part attributable to his desire to keep shareholders satisfied so that they will not oust him.' Thus, in the absence of fraud or bad faith, directors will not be held liable for mistakes of judgment in actions arguably taken for the benefit of the corporation."

2. The Atlas Directors Exercised Proper Business Judgment

Blasius also failed to make the second showing Grobow demands: it did not demonstrate that the Atlas Directors acted without proper business judgment on December 31, i.e., that the Board acted without "substantive due care . . . and procedural due care." Grobow, 539 A.2d at 189. It also failed to show that the actions of the Atlas directors lacked a rational business purpose.

First, Blasius failed to demonstrate that the Atlas directors acted without "procedural due care" on December 31. A director fails to exercise procedural due care only if he acts with "gross negligence, i.e., [if he] was uninformed in critical respects" when making the challenged decisions. Grobow, 539 A.2d at 190. The issue "of whether the directors reached an informed decision . . . must be determined only upon the basis of the information . . . reasonably available to the directors and relevant to their decision" at the time they took the challenged action. Smith v. Van Gorkom, Del. Supr., 488 A.2d 858, 874 (1985).

Blasius' failed to show that the Atlas directors acted unwisely on December 31 or indeed to point to any information reasonably available to the Atlas directors on December 31 which, had it been known to the directors, would have altered (or even influenced) the directors' decisions. The proof shows that the directors were not "uninformed in critical respects" at that time. In fact, the Atlas directors were informed in all critical respects when they acted on December 31. Specifically:

> **-- the Atlas directors were well-informed on the need to elect additional directors with mining expertise and had, in fact, been considering how best to address that need since early 1987. (Tr. at 30-33A, 117-20A, 27-30B.)**
>
> **-- the Atlas directors were well informed as to Harry Winters' qualifications when they elected him on December 31:**
>
> - a majority of the board had previously met Winters. (Tr. at 36-37A, 117-20A; Masinter Dep. at 6-8; Bongiovanni Dep. at 10.)

- the directors discussed Winters' candidacy at various times throughout November and December of 1987. (Tr. at 93-94A, 121-22A, 32-33B; Weaver Dep. at 15-34; Bongiovanni Dep. at 19.)

- the directors received copies of Winters' currivulum vitae and additional information regarding his consulting experience on December 24, 1987. (Tr. at 38A, 120-21A, 33-33B.)

- the directors had, in fact, already decided as of December 30, 1987 that Winters would be elected to the Board on January 6, 1988. (Tr. at 40A, 71A, 93A, 11-12B.)

- the directors discussed Winters' qualifications at the December 31 meeting. (Tr. at 89B; Farley Dep. at 13.)

-- The Atlas Directors were well informed as to John Devaney's qualifications when they elected him on December 31:

- several directors had previously concluded that Devaney should be a candidate for the Board. (Tr. at 13-14A, 54A; Weaver Dep. at 36-41.)

- all the directors had known Devaney for years. (Tr. at 95A, 123A.)

- Devaney had participated in board meetings for at least fifteen years. (Tr. at 123A.)

- Devaney was the company's chief financial officer. Accordingly, his abilities were well known to the Board. (Tr. at 123A; Bongiovanni Dep. at 20.)

- the directors discussed Devaney's qualifications at the December 31 meeting. (Tr. at 11-14B, 88B.)

-- On December 31, the Atlas directors were well-informed as to the contents and merits (or lack of merit) of Blasius' restructuring proposal:

- the Directors received copies of the restructuring proposal on or about December 9. (Tr. at 44A, 77A, 144A.)

- the Directors each independently reviewed the proposal in early December and independently concluded that the proposal would bankrupt Atlas or sharply circumscribe Atlas' ability to identify and develop new gold deposits. (Tr. at 45-48A, 77-78A, 88-91A, 144-45A, 66-71B, 88B.)

- the Directors shared their views of the restructuring proposal with one another at meetings and in phone conversations throughout December 1987. (Tr. at 48-49A, 78A, 80A, 71-72B, 88B.)

- the Atlas directors learned from Richard Weaver, from conversations with one another, and from Atlas' December 9 press release discussing the Blasius restructuring proposal that Goldman Sachs' initial view was that Blasius' restructuring proposal could severely harm Atlas. (Tr. at 80A, 186-87B; Bongiovanni Dep. at 7.)

- the Atlas directors were informed at the December 31 meeting that Goldman Sachs believed that Blasius' restructuring proposal would severely harm Atlas and that Goldman Sachs would make a full resentation of its views when the Board considered the restructuring proposal on January 6. (Tr. at 89B, 101-02B, 105-06B.)

- during the month of December, Weaver and Masinter were informed as to the initial results of Goldman Sachs' analysis of the Blasius restructuring proposal and were aware that Goldman Sachs did not consider the proposal to be workable or to be in Atlas' best interest. (Tr. at 147A, 151A, 59-65B, 150-62B, 183087B.)

-- The directors were well-informed, during December 1987, as to Atlas' financial condition:

- two directors (Farley and Weaver) had served as CEOs of Atlas, and the remaining five directors had over seventy-nine years cumulative experience as directors of Atlas. (Tr. at 34-36A.)

- the directors were aware of Atlas' projected cumulative cash flow over the next five years. (Tr. at 89A.)

- due to the fact that the Atlas directors were confronting in 1987 the decision of whether to write off Atlas' uranium business, "the bulk of each [directors'] meeting [in 1987 had been] dedicated to financial analysis" of the company. (Tr. at 54-55B.)

- in July 1987, the directors had received projections of Atlas' economic condition and performance in the upcoming year. (Tr. at 73A.)

- at least some of the directors were aware of projections made by Atlas in connection with Atlas' obtaining a gold loan from Bank of America of Atlas' economic condition and performance. (Tr. at 74A.)

-- The Atlas directors were well-informed as to Blasius' background and inexperience in the gold business:

- on December 2, the directors were presented with a report on Blasius and its principals describing the information gathered from Blasius' SEC filings, as well as the information collected by Goldman Sachs. (Tr. at 38-49B, 56-57B, 142-43B.)

- the obvious shortcomings in the Blasius restructuring proposal demonstrated that Blasius was not qualified to manage a gold business. (Tr. at 150A.)

-- The Atlas Directors were well-informed as to the nature and implications of the actions taken by Blasius on December 30.

- at the December 31 Board meeting, Edgar Masinter, as Atlas' legal counsel, carefully explained the consent submitted by Blasius, the other actions Blasius had

taken and the legal implications thereof to the Board. (Tr. at 134-35A, 21-23B, 89-90B.)

-- The Atlas directors were well-informed as to the need to act before Blasius sought a court order which might temporarily limit the directors' ability to respond to Blasius' attempt to gain control of Atlas. (Tr. at 133A, 17-19B, 22-23B, 26-27B, 92B.)

Although Blasius argues that the Atlas directors should not have acted on December 31 without first hearing the final report from Goldman Sachs concerning Blasius' restructuring proposal, such an argument ignores the fact that the Atlas directors had more than enough information available to them to recognize the absurdity of the Blasius proposal. Indeed, even a cursory review of the proposal revealed that it simply would not work. (Tr. at 58B, 145-48B.)

More importantly, the Blasius argument misinterprets what actually happened on December 31. The Atlas Board merely elected two new directors on that date and thereby guaranteed that Blasius could not precipitously implement its restructuring plan, which the Board unanimously considered not to be in the best interest of Atlas or its stockholders. The election of two new directors had no effect on the Board's ability to implement the Blasius restructuring proposal if, after future reflection, it were deemed appropriate. Indeed, the Atlas Board did not reject the restructuring proposal until after Goldman Sachs made its full Blasius presentation on January 6, 1988. In light of Goldman's persuasive demonstration that Blasius' proposal would bankrupt Atlas, the Atlas Board cannot be criticized for protecting its

shareholders and deciding not to restructure Atlas along the lines Blasius proposed. (Tr. at 162-83B.)

Second, to demonstrate an absence of substantive due care, Blasius was required to show that the Board's action was so prima facie "egregious as to be afforded no presumption of business judgment protection," Grobow, 539 A.2d at 189, i.e., that "no person of ordinary, sound business judgment" would deem the action to have been in the corporate interest. Id. (quoting Saxe v. Brady, Del. Ch., 184 A.2d 602, 610 (1962)).

Blasius offered no evidence that, on December 31, a "person of ordinary, sound business judgment," would not have elected Messrs. Winters and Devaney to the Atlas Board or have taken limited action that would have the effect of preventing the precipitous implementation of the Blasius restructuring proposal. Nor did it introduce any evidence that the Board's action cannot be attributed to a rational business purpose. Blasius' conspicuous silence can only create the loud inference that no such evidence exists. Van Gorkom, 488 A.2d 858, 878 (1985); Deberry v. State, Del. Supr., 457 A.2d 744, 754 (1983). And of course no such evidence does exist.

Moreover, the proof makes it clear that the action taken by the Atlas Board was rational and that a person of ordinary business judgment could conclude that such action was in the best interest of Atlas and its shareholders. Specifically, the record reveals that:

-- electing Harry Winters filled Atlas' need, identified by the Atlas Board since early 1987, for additional directors with expertise in Atlas' primary

business: the mining of precious metals. (Tr. at 32-34A, 40-41A, 92-93A, 117A, 27-32B.)

-- electing John Devaney, Atlas' chief financial officer, added an individual with expertise in accounting, tax and Atlas' internal finances to the Atlas Board at a time when the Board's current expert in those matters, Mr. Clinchy (Devaney's predecessor as chief financial officer of Atlas), was in failing health and unable to attend certain Atlas Board meetings. (Tr. at 42A, 54A, 95-96A; Weaver Dep. at 36, 39-40; Masinter Dep. at 76.)

-- electing two new Directors prevented Blasius from immediately electing a majority of the Board and using that majority to adopt a restructuring proposal that would have destroyed Atlas by:

- virtually eliminating Atlas' ability to develop its existing gold reserves, to discover and develop new deposits, and to fulfill its commitment to the Nuclear Regulatory Commission to conduct reclamation work in areas affected by Atlas' uranium operations. (Tr. at 47A, 91A, 146A, 70B, 169-83B.)

- imposing a massive debt burden on Atlas which would eventually force Atlas into bankruptcy. (Tr. at 41A, 44A, 47A, 50A, 89-90A, 169-83B.)

-- electing two new directors prevented Blasius from electing a majority of the Board and using that majority to impose a totally unworkable restructuring proposal upon Atlas which would have:

- allocated proceeds of the sale of Atlas' uranium assets to the shareholders when those proceeds were already pledged to the Bank of America to support the Bank's loan to Atlas. (Tr. at 46-47A.)

- assumed that certain option warrants would be exercised when history demonstrated that the warrants would not be exercised. (Tr. at 45-46A.)

- assumed that Atlas could obtain a $35 million gold loan when Atlas could not, in fact, obtain such a loan. (Tr. at 146A, 151-53A, 66-71B, 151-57B.)

- called for the issuance of over $125 million in debentures backed by Atlas' gold reserves when Atlas' reserves could only back debentures worth less than one third of that amount. (Tr. at 145A, 147A, 69B, 176-83B.)

-- electing two new directors prevented Blasius, a highly leveraged company which needed to liquidate some or all of Atlas' assets in order to earn the quick, short-term profit necessary to fund its heavy junk bond debt, from electing a majority to the Atlas Board. (Tr. at 39-49B.)

-- electing two new directors prevented Blasius and its principals, who were utterly unqualified to manage a gold company, from gaining control of the board. (Tr. at 150A, 46B, 90B.)

-- electing two new directors on December 31 was necessary because Blasius might attempt to obtain a court order temporarily enjoining the board from adding new members. (Tr. at 133A, 17-19B, 22-23B, 26-27B, 91B.)

C. The Actions of the Atlas Directors Should Be Upheld Under Unocal v. Mesa Petroleum

If this Court concludes that the factors articulated in Unocal are present in the instant case, then the modified business judgment rule governs. As a starting point Unocal and its progeny emphasize the fundamental principle that a Board of Directors' fiduciary obligation to the corporation and its stockholders requires that Board to "protect the corporate enterprise, which includes shareholders, from harm reasonably perceived, irrespective of its source," 493 A.2d at 954, including harm threatened by "change in control of the company," AC Acquisitions, 519 A.2d at 111. See also Unocal,

493 A.2d at 953-55.[5/] Accordingly, courts refuse to subject board action designed "to defeat a threatened change in control of the company" to the stringent "entire fairness" review accorded corporate actions which fall outside the protection of the business judgment rule. AC Acquisitions, 519 A.2d at 111.

By defeating a stockholder effort to unseat them or to obtain the stock necessary to do so (significantly, neither of which is the situation here, see Point I, B), the directors of a corporation may somehow be said to "entrench" themselves in office. See, e.g., Dynamic Corp. of America v. CTS Corp., 794 F.2d 250, 246 (7th Cir. 1986) (in battle for corporate control, directors are in effect "erecting obstacles to the taking over of the corporation by an investor who is likely to fire them if the takeover attempt succeeds, they have a clear conflict of interest.") Unocal requires, in light of the resulting "omnipresent specter that a board may [therefore] be acting primarily in its own interests, rather than those of the corporation and its shareholders", Ivanhoe Partners, 535 A.2d at 1341 (quoting Unocal, 493 A.2d at 954), that corporate action taken during a struggle for corporate control that has

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5/ Ivanhoe Partners v. Newmont Min. Corp., Del. Supr., 535 A.2d 1334, 1345 (1987) (Directors had "both the duty and responsibility" to oppose minority shareholders' efforts to gain control of the corporation); MacAndrews & Forbes Holdings, Inc. v. Revlon, Inc., Del. Ch., 501 A.2d 1239, 1247 (1985), aff'd, Del. Supr., 506 A.2d 173 (1986) ("In the face of a hostile acquisition, the directors have the right, even the duty, to adopt defensive measures to defeat a takeover attempt that is perceived as being contrary to the best interests of the corporation and its shareholders").

the incidental effect of entrenching the corporation's directors in office, be reviewed under a "flexible, intermediate form of judicial review." AC Acquisitions, 519 A.2d at 111. See generally, Ivanhoe, 535 A.2d at 1340-42; Unocal, 493 A.2d at 954-55.

Unocal holds that a board's actions will be accorded the protection of the business judgment rule if the directors make a prima facie showing (i) "that they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed . . .," Moran v. Household International, Inc., Del. Supr., 500 A.2d 1346, 1356 (1985) and (ii) that "the defensive mechanism was reasonable in relation to the threat posed." The directors' proof is materially enhanced (i) "where . . . a majority of the board favoring the proposal consisted of outside independent directors who have acted in accordance with the foregoing standards" and (ii) where the directors show good faith and reasonable investigation. Id. at 1355. See generally, Ivanhoe, 535 A.2d at 1340-42; Unocal, 493 A.2d at 954-55; AC Acquisitions, 519 A.2d at 111.

1. The Atlas Directors Had Reasonable Grounds For Believing Blasius Posed A Danger To Atlas' Corporate Policy And Effectiveness

The record amply demonstrates that the Atlas directors had reasonable grounds for believing that Blasius posed a danger to Atlas' corporate policy and effectiveness.

First, a majority of the Atlas directors who concluded that Blasius posed a threat were independent

outsiders. Only one director (Weaver) was part of Atlas' current management as of December 31. Only one other director (Farley) had an employment agreement with Atlas. The remaining directors were non-employee, non-management directors.6/

Second, the Atlas directors reasonably concluded (based on investigations by Atlas management, Edgar Masinter and Goldman Sachs) that Blasius was not qualified to manage a gold company and, indeed, had not managed its own operations well, had transformed the essential business of Blasius by assuming an enormous debt through the issuance of "junk bonds", had made tactical investments of part of the proceeds of the junk bond sales in the common stock of other companies, and

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6/ Although Mr. Clinchy was at one time an employee of Atlas, he has since retired and has no employment or consulting agreement with Atlas. Moreover, Blasius is wrong in arguing that Mr. Masinter, as a member of a law firm advising Atlas, was an insider. Generally, "outside" directors are regarded as "nonemployee, nonmanagement directors." Grobow, 539 A.2d at 184, n.1. See also Moran, 500 A.2d at 1348 n.2; Van Gorkom, 480 A.2d at 623; AC Acquisitions, 519 A.2d at 110 n.8. Directors who are members of institutions which do business with or advise the corporation are not considered insiders. See, e.g., Moran, 490 A.2d at 1088, aff'd, 500 A.2d 1346 (Director of Goldman Sachs not "inside" director of corporation Goldman advised). A different rule cannot be inferred from Frantz Manufacturing Co. v. EAC Industries, Del. Supr., 501 A.2d 401, 403 (1985), relied on by Blasius. In that case, the court referred to a director of Frantz Manufacturing Company ("Frantz") who was also a partner in "the law firm retained by Frantz" as "closely related to the Frantz corporation." The court did not provide further details of the lawyer's relationship with Frantz, did not label the lawyer an "insider" or adopt a general rule that partners in law firms representing corporations qualify as "insider directors" if they sit on the Board of those corporations.

appeared in desperate need of a short-term profit from Atlas to fund its hefty "junk bond" debt. (Tr. at 150A, 39-49B, 56-57B, 90B, 142-43B.) Thus, it was clearly appropriate for the directors to conclude that Blasius posed a threat to Atlas' corporate policy. See, e.g., Unocal, 493 A.2d at 956 (board justified in perceiving threat from "a corporate raider with a national reputation as a 'greenmailer'"); Ivanhoe, 535 A.2d at 1342 (board justified in perceiving threat from shareholder who 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").

Third, Blasius proposed to force Atlas into a restructuring proposal which, as already explained, the Atlas Board correctly perceived could bankrupt Atlas.

Fourth, as earlier demonstrated, the Atlas Board correctly concluded that the Blasius proposal would virtually eliminate Atlas' ability to maintain or expand its operations as a gold mining company. A Board's decision to pursue its corporation's long-term interests over short-term profit is clearly reasonable. See, e.g., Hahn v. Carter-Wallace, Inc., Del. Ch., C.A. No. 9097, Hartnett, V.C., slip op. at 5 (Oct. 9, 1987). See also Ivanhoe Partners (Board of Directors justified in opposing takeover proposal designed to break up company).7/

7/ Blasius' suggestion that the Board could not reasonably perceive the Blasius restructuring proposal as a "threat" because Blasius merely made the proposal as a "precatory" resolution verges on the ludicrous. Blasius' SEC filings demonstrated that Blasius' goal was to force Atlas to implement Blasius' restructuring proposal. In Amendment 2 (continued...)

Fifth, as noted earlier, the Atlas board correctly concluded that the Blasius restructuring proposal was totally unworkable.

Atlas perceived those facts to be so. Significantly, Blasius has not contested this conclusion and, indeed, chose not even to appear or testify at trial to offer any proof to the contrary. The refusal of the Blasius principals to testify at trial -- or be cross-examined -- as to the prudence of their proposal speaks volumes to the wisdom of the Atlas Board in protecting Atlas stockholders by impeding the implementation of the so-called restructuring.

7/(...continued)
to Blasius' Schedule 13D filed on December 30, 1987, Blasius stated: (i) that it "continues to urge the Company [(Atlas)] to implement a plan similar to the Restructuring Proposal" which it had proposed to Atlas on December 7 (PX 4, p. 5); (ii) that it initiated the Consent Solicitation as a result of Atlas' alleged failure to respond to the Restructuring Proposal; (iii) suggested that adoption of the Restructuring Proposal by Atlas would "obviate the need for the . . . [Blasius] program . . . relating to the election of additional directors of the Company [(Atlas)]," Id. at 5-6 and (iv) that, if Atlas implemented "a plan similar to the Restructuring Proposal," Blasius would "revoke its consent." Id. at 6. Moreover, Blasius' consent materials admitted that "Blasius has determined to undertake this Consent Solicitation in order to . . . attempt to implement a restructuring program similar to the Restructuring Proposal [presented on December 7] or, in the alternative, to undertake a sale of the Company. . . ." (DX VVV, p. 4.) Indeed, as Mr. Bongiovanni noted: "When we first got the proposal [on December 7] . . ., my reaction to that was that it was a recommendation. But as we got into the December 31st meeting and suddenly they were asking for Atlas stockholder lists and started the consent solicitation and suing us in Delaware, then that wasn't a recommendation any more; that was an attempt to take over the company, and it was a hostile action." (Tr. 86-87A.)

2. The Actions Of The Atlas Directors Were Reasonable In Relation To The Threat Posed

The Atlas directors have also made the second Unocal showing: their actions were reasonable in relation to the threat posed. A Board's actions are reasonable in relation to a threat posed if they are reasonably tailored to address the evil created or threatened by the dissident shareholders' effort to seize control of the corporation. Ivanhoe, 535 A.2d at 1342-44. In making its appraisal courts look to both "the reasonableness of the defensive measures employed and the results achieved." Id. at 1342-43.

In the present case, the threatened evil was that Blasius would obtain a majority of the Atlas Board and use that majority to impose upon Atlas stockholders. The Atlas Board's response directly addressed that threat: it insured that Blasius could not obtain a majority on the Atlas Board before November 1988 (when three incumbent directors faced reelection). The effect of the directors' response was, however, extremely circumscribed. Specifically:

> **-- it did not deny Blasius the opportunity to conduct a solicitation as to all proposals contained in the First Consent, with the single exception that Blasius could only elect six, not eight, members to the Board.**
>
> **-- it did not deny Blasius the opportunity to elect a substantial minority of the board by filling six available seats (constituting 40% of the board).**
>
> **-- it did not foreclose Blasius from electing a majority of the board in 1988, it simply required Blasius to wait until November 1988 to do so.**
>
> **-- it did not foreclose the possibility that the Board would adopt the Blasius restructuring**

proposal: it simply insured that the Atlas Board would have Goldman Sachs' final, completed analysis of the proposal available to it when it made the final determination (on January 6) of whether to adopt the proposal.

-- the Atlas directors simply accelerated by six days their preexisting plan to expand the size of the board and, further, to elect Winters to the board.

-- the Atlas directors placed a second person on the board, John Devaney, who, as Atlas' chief financial officer, was extremely well known to the Atlas directors, was extremely knowledgeable in Atlas' affairs, and was likely to have been elected to the Board in any event. (Tr. at 13-14A, 42A, 54A, 95-96A; Weaver Dep. at 36, 39-40; Masinter Dep. at 76.)

-- there was nothing unusual in the Board acting to add new directors: the Atlas Board had done so before (Tr. at 55A), and, indeed, had planned to elect Winters in that manner at the January 6 Board meeting. (Tr. at 40A, 55A, 71A, 93A, 11-12B.)

The Ivanhoe decision highlights the "reasonableness" of the Atlas Board's response to the Blasius threat. In Ivanhoe, a Board resisted a take-over attempt by entering into an agreement with a minority stockholder under which the stockholder was to acquire up to 49.9% of Ivanhoe's stock. The Board issued a large cash dividend to provide the "white knight" with the funds to make the necessary stock purchases. The payment also distributed some of the firm's under-valued assets to the stockholders (thereby eliminating much of the profit the corporate raider would have gained if he succeeded and seized control). The Delaware Supreme Court held the Board's action to be a reasonable response to the danger posed.

In contrast, the conduct of the Atlas Board on December 31 was modest by comparison. Atlas did not seek a

"white knight," it did not issue a cash dividend, it did not restructure the corporation, it did not "dilute" Blasius' holdings, nor in any way alter the balance of stockholder power: it simply continued with its existing plan to elect new directors to the Atlas Board. Thus, even under the Unocal standard, the Atlas Board acted well within the limits of its fiduciary duty.

D. Schnell And Its Progeny Confirm That The Business Judgment or Unocal Standards Govern This Case

Blasius would ask this Court to ignore controlling precedent and contends that Schnell mandates that the actions of the Atlas directors be put to "heightened scrutiny." Blasius never clearly describes the rule it believes Schnell creates, but seems to suggest that heightened scrutiny is called for because the actions taken by the Atlas Board had the effect (regardless of the intentions of the Atlas directors) of frustrating Blasius' efforts to use the "corporate democratic process" to seize control of Atlas.[8/] Schnell creates no such

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8/ Blasius argues, first, that the action of the Atlas directors should be put to heightened scrutiny because "defendants wholly precluded . . . [plaintiffs] from undertaking an election contest." In fact, Blasius did engage in an election contest and, indeed, now argues to this Court that (at a minimum) it elected six directors to the Atlas board. Accordingly, Blasius' real gripe is that the Atlas Board prevented Blasius from accomplishing all it wished to achieve in a consent solicitation when it wished to achieve it. Blasius contends, second, that heightened scrutiny is called for because the Atlas board "entrenched" itself. Blasius, of course, never demonstrated that any entrenchment occurred. Even if it did, however, it never rebuts defendants' showing that the Atlas directors' primary motivation was their desire to put eminently qualified directors on the board and to stop

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rule. Rather, the Schnell cases are simply decisions in which courts applied the well-established precept that the business judgment rule does not apply to director action taken (i) solely or primarily in order to entrench the directors in office or (ii) without proper business judgment. See, e.g., Grobow.

This Court's recent discussion of Schnell in Ivanhoe, 533 A.2d at 601,[9] defines what Schnell does and (implicitly) does not establish. There, this Court observed that Schnell established that "challenged [corporate] transactions, even if otherwise lawful, may be invalidated if they are found to have been employed for an inequitable purpose, such as perpetuating the directors in control," Id. at 601, and that Schnell does not apply unless plaintiffs show that "the challenged transactions represent a unified entrenchment scheme motivated by a single dominant entrenchment purpose," Id., or, restating the same point, "that the defendants [(the Directors)] were motivated by an overriding subjective intent to entrench themselves". Id.

This Court read the Schnell cases correctly. In each Schnell case the determinative factor was not that the

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8/(...continued)
Blasius' unwise restructuring proposal. Blasius' second argument therefore reduces to the claim that a per se rule exists dictating that conduct which has the incidental effect of entrenching a board merits "heightened scrutiny."

9/ The court queried whether Schnell was good law after Unocal, Ivanhoe, supra, 533 A.2d at 601 n.17, but did not answer the question because, even under Schnell, plaintiffs' claims failed in that case.

director's action in some way affected the corporate democratic process, but rather, that the directors acted, without any business justification, to entrench themselves in office. In Schnell itself, for example, an incumbent board sought to manipulate the date and place of the corporation's annual meeting in order to defeat shareholders' efforts to replace the incumbents with a "rival slate" of directors. Schnell, 285 A.2d at 433. The Supreme Court held:

> In our view, those conclusions [of the lower court] amount to a finding that management has attempted to utilize the corporate machinery and the Delaware Law for the purpose of perpetuating itself in office; and, to that end, for the purpose of obstructing the legitimate efforts of dissident stockholders in the exercise of their rights to undertake a proxy contest against management. These are inequitable purposes . . . . The advancement by directors of the by-law date of a stockholders' meeting, for such purposes, may not be permitted to stand.

Id. at 439. The court emphasized that it would not have interfered with the meeting date without a "finding . . . of inequitable action on the part of management." Id. Similarly, in the only other Schnell case decided by the Delaware Supreme Court, Giuricich, Del. Supr., 449 A.2d at 239, the court held that defendant directors had prevented the election of successor directors by the "willful perpetuation of a shareholder deadlock," Id., for the admitted, and clearly improper, purpose of "giv[ing] the defendants the governing

hand in forthcoming executive compensation contract negotiations." Id.[10/]

Not only do the Schnell cases nowhere suggest that board actions forfeit business judgement protection simply because they affect the exercise of corporate democracy, but the Delaware courts have repeatedly upheld corporate actions under the business judgement rule which do exactly that. Moran v. Household Int'l lays out the rule. There, the court considered a board of directors' adoption of a "poison pill" which had some deterrent effect on the "formation of proxy efforts." Id. at 1080. In upholding the pill under the business judgment rule the Court of Chancery observed:

> The subversion of corporate democracy by manipulation of corporate machinery will not be countenanced under Delaware Law. Schnell v. Chris-Craft Industries, Special scrutiny will be given a situation in which directors, bent upon entrenchment, use their authority to restrict the ability of shareholders to replace them. Giuricich v. Emtrol Corp., Del. Supr., 449 A.2d 232 (1982); Lerman v. Diagnostic

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10/ The other Schnell cases cited by Blasius also held that the defendant directors acted, without business justification, to entrench themselves in office. In Aprahamian v. HBO & Company, Del. Ch., 531 A.2d 1204 (1987) the defendant directors, seeking reelection to the board, Id. at 1206, manipulated the corporate machinery in order to defeat a slate of rival directors. Id. at 1207. The defendants proffered no reason for believing that their actions were in "the interests of the stockholders." Id. at 1207. In fact, both slates of directors proposed "similar" plans to sell the corporation. Similarly, Lerman v. Diagnostic Data, Inc., Del. Ch., 421 A.2d 906, 914 (1980) held that board action for which there was no valid business justification, Id. at 913-14 (board action was "unreasonable" and "unnecessary under the circumstances") and which had "the accompanying dual effect of thwarting shareholder opposition and perpetuating management in office," Id. at 914, did not merit protection under the business judgment rule.

> Data, Inc., Del. Ch., 421 A.2d 906 (1980). There are, however, options available to a board of directors, under the business judgment rule, which may restrict the scope of shareholder approval. Thus, a self-tender offer may indirectly narrow the voting pool and decrease the number of shares required for majority approval. Similarly, the enactment of supermajority approval for acquisitions through board resolution may alter the percentage of approval for a proposed merger. National Education Corp. v. Bell & Howell Co., [Del. Ch., C.A. No. 7278, Brown, C. (August 25, 1983)] The right of a shareholder to vote his shares is not immutable if the goal is not entrenchment and the voting change is otherwise within the board's authority.

Id.

So, for example, an incumbent board may use corporate funds to directly defeat a stockholder's attempt to gain control of the corporation in a "proxy contest," Unocal, 493 A.2d at 957, see also Hibbert v. Hollywood Park, Inc., Del. Supr., 457 A.2d 339 (1983), or, as in Empire of Carolina, Inc. v. Deltona Corp., Del. Supr., 514 A.2d 1091 (1985), use its lawful powers to repulse a dissident stockholders' effort to seize control of the corporation through a consent solicitation.

In Deltona, a Deltona shareholder (Empire) disclosed to Deltona's Board that it intended to solicit written consents to remove Deltona's directors. Empire made the disclosure in a Schedule 13D filed with the SEC, and in a letter, delivered to Deltona's offices, demanding a copy of Deltona's shareholder list. Empire did not, however, actually deliver an executed written consent to Deltona until several days later. In the interim, the Deltona Board of Directors (fully aware of Empire's 13D filing and demand for a shareholder list) acted

pursuant to 8 Del. C. § 213 to set a record date six weeks in the future for determining which stockholders were entitled to express written consent to Empire's proposal. Deltona expected that, by the time the six weeks were up, it would have completed the sale of a large block of shares to Topeka Group, Inc. If completed, the sale would have left Topeka and Deltona's President in effective control of over 51% of Deltona's share. Id. at 1095-96. In other words, if the Board's record date were "the validly set record date . . . Empire's attempt to take control over Deltona would likely be defeated." Id. at 1094. The Supreme Court, after determining that the record date was set pursuant to a "bona fide business purpose and not for the purposes of entrenching Deltona's Board of Directors," Id. at 1097, upheld the board's action as a reasonable exercise of the Board's business judgment.11/

American International Rent A Car Inc. v. Cross, Del. Ch., C.A. No. 7583, Berger, V.C. (May 9, 1984), reprinted in 9 Del. J. Corp. L. 144, is another case in point. There the Board of Directors called a shareholder's meeting hoping the shareholders would amend a bylaw and thereby open the way for a stock sale which the Board believed would bring needed cash to the corporation. Once the meeting began, however, it became

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11/ Dissident stockholders have frequently resorted to consent solicitations in battles for corporate control, and no court has ever suggested Boards may not act vigorously to resist them. See, e.g., LA Partners, L.P. v. Allegis Corp., Del. Ch., C.A. No. 9033, slip op. at 1, Berger, V.C. (Oct. 22, 1987); Shapiro v. Pabst Brewing Co., Del. Ch., C.A. No. 7339, slip op. at 4, Berger, V.C., (July 30, 1985), reprinted in 11 Del. J. Corp. L. 704.

apparent that the stockholders might reject the amendment. The Directors thereupon recessed the meeting, convened a special Directors' Meeting, adopted the amendment, and initiated the stock sale. The court refused to enjoin the sale. Once again, the court rejected any suggestion that the Board was precluded from interfering with a shareholder's use of the corporate democratic process. Specifically, it rejected the argument that Schnell applied, noting that the Board did not act for an inequitable purpose, and concluded that, "although the Board's action had the effect of withdrawing a vote from the stockholders," Id., slip op. at 7, the Board was empowered to amend the bylaws and had properly used that power in the good faith belief that the amendment was in the corporation's best interest.

Finally, in Thompson v. Enstar Corp., Del. Ch., 509 A.2d 578 (1984), the court upheld a Board's good faith decision postponing the shareholders' annual meeting by four weeks -- even though the court recognized that the postponement allowed the Board to defer a proxy contest for control of the corporation; that the Board would, in all likelihood, be unseated in the contest; and that the delay would allow the "lame duck" board to complete the sale of the corporation before being ousted.12/

12/ Cf. Treco, Inc. v. Land of Lincoln Savings & Loan, 749 F.2d 374 (7th Cir. 1984) (Board acted properly in responding to threat of shareholder owning 41% of company's stock to gain control of board through proxy contest and liquidate company by amending the corporate bylaws to provide that Directors could only be removed by a supermajority vote).

The rule that a Board may, for a proper business purpose, take actions which affect the corporate democratic processes is no less vibrant in a Unocal-type context, i.e., when the board's action has the incidental effect of "entrenching" the board in office. Unocal, of course, is expressly predicated on the view that directors must oppose "threats" to the corporation, even if those threats are posed by shareholders. Unocal, 493 A.2d at 955. See generally, Ivanhoe, (board blocks shareholder's takeover bid). Courts, accordingly, recognize that such a "threat" may implicate the corporate democratic process and that the board's response may affect that process.

In Polk v. Good, Del. Supr., 507 A.2d 531 (1986), for example, the Delaware Supreme Court applied Unocal in examining a company's purchase, at a substantial premium, of shares from a dissident shareholder who had threatened to challenge the board through the corporate democratic processes. Id. at 537. The effect of the board's action, of course, was not only to eliminate the shareholder who intended to use corporate democracy to challenge the board, but to eliminate a large block of votes which would have supported other dissident shareholders who used the same processes to advance similar proposals. Nevertheless, the court upheld the board's action and, in doing so, rejected the argument that Unocal did not "sanction" actions which interfere with shareholders' exercise of corporate democracy:

> [Plaintiffs] argue that these [Unocal] cases do not sanction the repurchase at a premium of shares of

> those who threaten such activities as proxy fights and tender offers -- the exercise of legitimate corporate 'democratic processes.' However, our recent decision in Unocal completely rejects that thesis, and we need not repeat it here. Unocal, 493 A.2d at 953-55.[13/]

Id.

Similarly, in Ivanhoe, the Delaware Supreme Court upheld under Unocal a Board of Directors' action that ensured that a majority of the company stock would be held by shareholders who would oppose an effort by a dissident shareholder to gain (by proxy contest or some other means) control of the company's board. Specifically, in Ivanhoe, the Board of Newmont Mining issued a special cash dividend to its shareholders. The dividend allowed one of those shareholders to "engage in a 'street sweep' of Newmont stock, thereby increasing . . . [that shareholder's] ownership of Newmont from 26% to 49%." Ivanhoe, 535 A.2d at 1336-37. The "street sweep" defeated the efforts of a second Newmont shareholder,

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13/ Nor do the cases cited Blasius' at p. 39-48 of Petitioners' Pretrial Memorandum support Blasius' view of the law. Moran, for example, applied the Unocal standard to judge a "poison pill" which, as Blasius admits, had the "incidental consequence of limiting the proxy activity of those opposed to the Board's present policies." Petitioners' Mem. at 40. In Henley Group, Inc. v. Santa Fe Southern Pacific Corp., Del. Ch., C.A. No. 9569, Jacobs, V.C. (March 11, 1988), the court denied a request for a preliminary injunction enjoining certain actions taken by the board of Santa Fe Southern Pacific Corporation which allegedly harmed the shareholders' "right" to wage a proxy contest because plaintiffs failed to show they would be irreparably harmed by the challenged actions. Id., slip op. at 28, 50. The court expressly declined to reach the Unocal and Schnell issues. Id., slip op. at 28.

Ivanhoe Partners and Ivanhoe Acquisitions ("Ivanhoe"), to obtain control of a majority of Newmont stock.

In short, Blasius' view of Schnell ignores established precedent. It would also make bad law. First, it would effectively put courts in the business of managing corporations. Under Blasius' rule, if any shareholder commenced a consent solicitation or proxy contest concerning any aspect of corporate governance and the board acted contrary to the shareholder's proposal during the solicitation period, the court would subject the directors' actions to "heightened judicial scrutiny." Such a circumstance would negate the fundamental rule that directors, not courts, manage corporations. See, e.g., 8 Del. C. § 141.

Second, Blasius' proposed rule would paralyze a board in carrying out its Unocal duty to oppose hostile threats. A corporate raider, by simply filing a consent or initiating a proxy contest, could require the target corporation's directors to justify any defensive measures under "heightened scrutiny." Such a rule would not only effectively overrule Unocal, it would severely hamper directors' abilities to perform their fiduciary obligation to combat takeover efforts which would harm the corporate interest.14/

14/ Blasius suggests that Datapoint Corp. v. Plaza Securities Co., Del. Supr., 496 A.2d 1031 (1985) and Allen v. Prime Computer, Inc., Del. Supr., No. 26, Moore, J. (Apr. 8, 1988) hold that it is per se unreasonable for directors to thwart a dissident stockholder's effort to immediately seize control of the board through the consent process. Blasius is wrong. Datapoint and Prime hold that a board may not adopt a by-law which effectively eliminates

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In fact, if the cases Blasius cites suggest that corporate action that interferes with the exercise of corporate democracy should be put to "heightened scrutiny," those same cases hold that the Unocal standard provides the appropriate level of "heightened scrutiny." In Phillips v. Insituform of North America, Del. Ch., C.A. No. 9173, Allen, C. (August 27, 1987), for example, this court reviewed a series of actions taken by a Board which had the effect of removing "control of [the] vote of the [company's] Class B stock (and, thus, under the company's structure, control of the company's board) from the block of Class B shares now held by . . . [certain] receivers." Id., slip op. at 1. Blasius claims the court applied heightened scrutiny because the corporate action interfered with shareholders' right to vote. Plaintiffs' Mem. at 21-22. In fact, the court put the Board's action to heightened scrutiny because the Board's action had the incidental effect of entrenching the directors in office.15/

14/(...continued)
stockholders' statutory right to act by written consent. The Atlas directors adopted no such by-law, as witnessed by Blasius' present claim that Blasius elected 40% of the board in the recent consent solicitation. Datapoint and Prime nowhere suggest that, when a board is empowered to elect directors, that board may not use its power once a dissident stockholder has initiated a consent solicitation designed to elect a majority of the board. Indeed, Blasius' proposed reading of Datapoint would create the rule that Unocal allows a board to battle a stockholder's effort to gain control of a corporation through a proxy contest, but not to battle the same stockholder's effort to accomplish the same result in a consent solicitation.

15/ See, e.g., Phillips, slip op. at 14 (plaintiffs alleged directors acted because Class B shares posed a threat to their incumbency); Id., slip op. (court holds Board had
(continued...)

If Blasius is right, however, Phillips clearly holds that Unocal defines the appropriate standard of review. See Phillips, slip op. at 18-21, 24, 26 (court expressly holds that Unocal provides the standard of scrutiny to be applied).16/

E. The Actions Of The Atlas Directors Should Be Upheld Under "Entire Fairness" Review

A board's action that "does not qualify for the protections afforded by the business judgment rule" (either because the plaintiff has shown the rule does not apply or because the defendant has not made the showings demanded by Unocal) will be "sustained if it is objectively or intrinsically fair . . . to shareholders." AC Acquisitions, 519 A.2d at 115. The actions taken by the Atlas directors pass such scrutiny.

15/(...continued)
become "committed adversary of [Class B] shareholders" and was acting to thwart them from "exercising powers claimed by them . . . to act by written consent in lieu of a meeting"); Id. at n.7 (Board action tended to "insulate the board from potential discipline by the shareholders").

16/ In Lerman v. Diagnostic Data, Inc., Del Ch., 421 A.2d 906, 914 (1980), the court struck down corporate action (taken during a battle for corporate control) which entrenched the board in power as "inequitable (in the sense of being unnecessary under the circumstances)," Id. Blasius views Lerman as a case in which the court applied "heightened scrutiny" because corporate democracy was implicated. If so, Lerman strongly suggests that the Unocal standard governs. Lerman, of course, predates Unocal, but the court's holding that the directors' conduct was "unnecessary under the circumstances" echoes the second query in the Unocal analysis: was the board's actions "reasonable in relation to threat posed[?]" Moran, 500 A.2d at 1356.

First, both Messrs. Winters and Devaney were highly qualified persons who filled specific needs on the Atlas Board. (Tr. at 37-41A, 85A, 93A, 116-17A, 121A, 130A, 26-27B; DX I; PX 14.) Blasius has not even suggested anything to the contrary.

Second, the Atlas directors acted to prevent Blasius from implementing a restructuring proposal that was not in the best interests of Atlas and its stockholders. Specifically, Robert Fisher, a Vice President of Goldman Sachs who analyzed the Blasius proposal, explained that:

> **-- the proposal would bankrupt Atlas. (Tr. at 169-83B.)**
>
> **-- the proposal would strip Atlas of the capital necessary to develop its existing gold deposits or to discover and develop new deposits. (Tr. at 169-83B.)**
>
> **-- the proposal was unworkable. It assumed Atlas could obtain a gold loan Atlas could notobtain. It assumed Atlas could distribute profitsfrom the sale of uranium assets to shareholders, whenAtlas had already pledged those assets to Bank of America, and it assumed Atlas could issue gold-backeddebentures in the amount of $152 million when Atlas'reserves could not back debentures of a fraction ofthat value. (Tr. at 169-83B.)**

Remarkably, Blasius presented absolutely no evidence to contradict defendants' showing that the Blasius proposal would ruin Atlas. Blasius chose not to contest this conclusion and chose, for reasons known only to itself, not to have Mr. Lubin, Mr. Delano or someone else testify about the Blasius proposal and its consequences for Atlas stockholders. The only conclusion, therefore, the trial record can support is that the proposal, if imposed on Atlas, would in fact have all the

adverse consequences the Atlas board, Atlas management and Goldman Sachs concluded it would have.

Blasius may, however, attempt to suggest that Fisher's testimony is somehow undermined by the fact that (i) in early October, 1987, an analyst at Goldman Sachs predicted that gold prices might rise to $600 an ounce during the next five years and (ii) in February 1988, new gold discoveries raised Atlas' proven and probable gold reserves from 600,000 ounces to 675,000 ounces. (Tr. at 203-04, PX 47 at p. 1.) Neither fact, however, even remotely suggests the Blasius proposal would be in Atlas' best interest.

First, the Blasius proposal would not work even if the price of gold exceeded $675 an ounce. (Tr. at 182B, 201B.) And, of course, the estimate that gold prices would rise above $600 an ounce was made before the October 19 stock market crash and was no longer realistic by the end of 1987 when the Blasius proposal was being evaluated. (Tr. at 198B.)

Second, the Blasius proposal would ruin Atlas even if Atlas' proven and probable reserves substantially exceeded 675,000 ounces. Specifically, Atlas would need to invest between $28 and $50 million to build the second plant necessary to take advantage of the additional gold discoveries (Tr. at 193B), and that at least some of that investment would have to be made before the company could profit from the new reserves. (Tr. at 202B). Indeed, "even under aggressive price assumptions" Atlas could not afford (under the Blasius proposal) to invest the $34 million it needed to fund its

existing development program, much less the additional $28-50 million necessary to take advantage of the newly discovered reserves. (Tr. at 169-183B, 202B). The best Atlas could do would be to "farm . . . out" the reserves to another company "that had a stronger capitalization and to allow [that other company] . . . to share in the profits." (Tr. at 202B). Obviously, such a course was not the way for Atlas to maximize it profits. (Id.)

Furthermore, even though Atlas' gold reserves had increased by 75,000 ounces to 675,000 ounces, the Blasius proposal remained utterly unworkable. Even with the new discoveries, it was unlikely that Atlas could obtain the gold loan Blasius envisioned. (Tr. at 203B). More dramatically, the Blasius proposal assumed that Atlas would have sufficient reserves to back $152 million in debentures. (Tr. at 176B). In fact, if Atlas' present reserves were 600,000 ounces, Atlas could only back debentures worth 28% that amount. (Tr. at 176-180B). Obviously, increasing Atlas' reserves by 12% (from 600,000 ounces to 675,000 ounces) did not cure the shortfall.

The evidence at trial was clear and consistent: the Blasius proposal would have ruined Atlas under any set of assumptions. In response, Blasius was not able to produce a single witness who could testify that the restructuring proposal was in Atlas' best interest or, indeed, that it was even workable.

Blasius' argument that the Atlas board acted improperly on December 31 is contradicted by settled Delaware law and by the trial record. Legally, the board's action must be scrutinized and upheld under the business judgment rule or under Unocal. Blasius' claim that some form of more heightened scrutiny governs simply misstates the law. Even if such "heightened scrutiny" were applied, however, Blasius' argument reduces to the remarkable request that this Court undo corporate action that Blasius has made no effort to show was irrational, unwise or objectively unfair to the Atlas stockholders and that the record affirmatively demonstrates was in Atlas' best interest. In short, Messrs. Devaney and Winters were validly elected to the Atlas Board on December 31, 1987.

POINT II

THE CERTIFIED RESULTS OF THE INDEPENDENT JUDGES OF STOCKHOLDERS' VOTES SHOULD NOT BE DISTURBED

A. The Legal Standard

On March 22, 1988, the Independent Judges of Stockholders' Votes certified the results of Blasius' solicitation of consents from Atlas stockholders. According to that certification, none of the five proposals for which Blasius solicited consents received a sufficient number of consents. Specifically, the independent inspectors certified that:

(i) the holders of 1,444,807 shares of Atlas common stock delivered valid unrevoked consents in favor of Blasius Proposal 1 and it was therefore not adopted;

(ii) the holders of 1,436,464 shares of Atlas common stock delivered valid unrevoked consents in favor of Blasius Proposal 2 and it was therefore not adopted;

(iii) the holders of 1,439,209 shares of Atlas common stock delivered unrevoked consents in favor of Blasius Proposal 3 and it was therefore adopted;

(iv) the holders of 1,435,023 shares of Atlas common stock delivered valid unrevoked consents in favor of the election of eight new directors nominated in Blasius Proposal 4 so that none of those nominees was elected; and

(v) the holders of 1,434,728 shares of Atlas common stock delivered valid unrevoked consents in favor of the election of seven new directors nominated in Blasius Proposal 5 so that none of those nominees was elected.

(DX EEEE.) This Court should not disturb that result.[17/]

Blasius' primary contention in this aspect of the litigation is that the independent inspectors of the election erred in their tabulation of conflicting and irreconcilable consents and revocations received from certain institutional record holders and the Independent Election Corporation of America ("IECA") on behalf of certain other institutional record holders. Faced with the task of tabulating certain conflicting and irreconcilable cards, the independent inspectors decided to subtract or "net-out" for each institution that submitted conflicting cards the number of revocations from the number of consents, and thus count only

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17/ The parties agree that the inspectors made an error in Atlas' favor in the amount of 7,000 shares on Proposals 2-4 and 6,508 shares on Proposal 5, and that this Court may properly correct such an error. Correction of this error does nt change the result on any of Blasius' proposals. See Section II of the chart annexed as Exhibit A.

the excess, if any, of consenting shares over revocations for each institution. See DX EEEE.

Such a methodology did not in any way do violence to the face of the cards. Rather, the inspectors took one of two plausible approaches in resolving what, from the face of the cards alone, was an unsolvable problem. The inspectors made their decision after discussing the matter at length with representatives of Blasius and Atlas, with the inspectors' own counsel, Shapiro Dep. at 36-38, with the department head in stock transfer administration at Manufacturers Hanover Trust Company, Id. at 38-39, and, obviously, among one another, Id. at 39-42. Further, the inspectors had substantial experience, with one of the inspectors acting as an inspector of election on approximately 300 prior occasions, including many contested situations. Id. at 6. Significantly, there has never been any suggestion that the inspectors' decision as to how to treat the conflicting cards was anything other than a good faith and duly considered judgment on their part.

Blasius, however, urges this Court to reverse the certified results of the independent inspectors by relying on extrinsic evidence from record stockholders and from IECA, which executed the cards at issue, as to their real "intent" in executing the cards. As demonstrated below, such extrinsic evidence is irrelevant and inadmissible.

In Williams v. Sterling Oil of Oklahoma, Inc., Del. Supr., 273 A.2d 264, 265 (1971), for example, the independent judges of a proxy contest discovered that a record stockholder,

Parker, Bishop & Welsh ("Parker"), had submitted two virtually identical proxies, one voting in favor of management and one voting in favor of the insurgent Committee, that were dated the same date. See Williams v. Sterling Oil of Oklahoma, Inc., 267 A.2d 630, 631 (1970), rev'd, Del. Supr., 273 A.2d 264 (1971). In order to resolve the inconsistency, the independent judges considered extrinsic evidence to determine the intent. Specifically, they considered an affidavit of Parker's executive vice-president, which had been secured by an attorney for management. Id. at 632. The affidavit stated, inter alia, that Parker's true intent had been to vote for management. Id. Thus, the independent judges declared management to be the winner of the proxy context. The Chancery Court upheld this result. 273 A.2d 264. The Supreme Court reversed. 267 A.2d 630.18/

As the Supreme Court held, the interpretation of conflicting proxies is purely a ministerial task. Williams, 273 A.2d at 265. See also Standard Power & Light Corp. v. Investment Assoc., Inc., Del. Ch., 51 A.2d 572 (1947); Gow v. Consolidated Coppermines Corp., Del. Ch., 165 A. 135 (1933). Thus, "the proper rule" is that "inspector of an election must reject all identical but conflicting proxies" and "conflicting

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18/ Curiously, Blasius cites Williams for the proposition adopted by the Chancery Court but reversed by the Supreme Court, i.e., that inspectors should "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." Petitioners' Mem. at 64.

proxies, irreconcilable on their faces or from the books and reocres of the corporation, may not be reconciled by extrinsic evidence." Id. See also Pope v. Whitridge, 110 Md. 468, 73 A. 281, 286 (1909).

As the Williams Court explained, such a rule is a:

> "necessity for practical and certain procedures in the fair handling of proxies and the expeditious conclusion of corporate elections.
>
> * * *
>
> "We agree, of course, that the correction of clerical mistake should be favored over disenfranchisement; but not at the price of uncertainty of procedure, impractical delay in election results, or possible invitation to fraud. The policy favoring correction of mistrake must be limited to corrections that can be made from the face of the proxy itself or from the regular books and reocrds of the corporation."

273 A.2d at 265.

The Williams case is directly applicable here. Various stockholders, as in Williams, executed conflciting consents and revocations that could not be reconciled on the face of the cards themselves. Thus, in order to treat consistently the more than forty stockholders submitting conflicting cards, the independent inspectors concluded, in a manner consistent with Williams, that they would not consider extrinsic evidence to reconcile consents to the extent those consents conflicted with same dated revocations. Thus, although true that some stockholders may have been disenfranchised, the cost of any such disenfranchisement is overborne by the certainty of procedure and avoidance of fraud

that the approach of the independent inspectors encouraged. See Williams, 273 A.2d at 265.19/

Blasius does not fare any better in its strained reading of Schott v. Climax Molybdenum Company, Del. Ch., 154 A.2d 221 (1959). Schott did not announce any rule of law that was not followed by the independent inspectors in this case, as Blasius would suggest. In Schott, the issue before the court was whether a merger had received the approval of two-thirds of the outstanding common stock as statutorily required. It was not a consent solicitation. Moreover, the Schott court upheld the inspectors' decision that where a series of proxies had been given by a single broker, the entire series of proxies would be counted, rather than only the last proxy. Significantly, the court did not hold that such a decision was the only one available to the inspectors. Rather, it simply held that the inspectors' decision in that particular case was a proper one where it was unclear how to vote the conflicting proxies and the inspectors reached an independent decision how to treat them. 154 A.2d at 223.

Thus, Schott did not hold that same dated consents that, on their face, reflected a number of shares voted in favor and a number of shares voted against the Blasius proposals, could not properly be counted by the independent inspectors by subtracting or netting out the votes "against"

19/ While Williams dealt directly with the scope of authority of the inspector, Blasius concedes that it is equally applicable to the scope of this Court's authority. Transcript of oral argument of May 12, 1988 at 26-27.

from those voted in favor of the Blasius proposals. Schott did nothing more than uphold the considered judgment of the independent inspectors in that case. Where, as here, the independent inspectors acted reasonably and in good faith in tabulating the consents delivered to them, the certified results should not be disturbed.

Moreover, if this Court were inclined to admit extrinsic evidence, then the artificial limitation urged by Blasius should not be adopted. It is manifestly unjust. If the Court considers extrinsic evidence, then it should -- as the Schott court did -- look to evidence of the intent of the beneficial owners, particularly where, as here, there is compelling evidence that the intent of certain beneficial owners has not been respected by certain record owners or their clearing agents as a result of either innocent mistake or more serious wrongdoing.

It is well established that "[i]n reviewing a contested election...the court has occasionally been required to look behind mere record ownership of stock and reject the votes cast by the record owner where inequitable circumstances appear which make it improper for such votes to be cast." Gellis v. S. Gellis & Co., Del. Ch., 322 A.2d 287, 290 (1974). See Freeman v. Fabiniak, Del. Ch., C.A. No. 8035, Hartnett, V.C. (Aug. 15, 1985), reprinted in 11 Del. J. Corp. L. 623, 635; In re Giant Portland Cement Co., Del. Ch., 21 A.2d 697, 702 (1941). Inequitable circumstances have been held to include ultra vires, negligent or improper willful acts or

omissions. In re Giant Portland Cement Co., 21 A.2d at 702. In short, the court has the inherent, equitable authority to determine "where justice lies". In re Canal Constr. Co., Del. Ch., 182 A. 545, 548 (936).

Here, if this Court considers extrinsic evidence, then it must look to extrinsic evidence of all execution errors made by record holders. After all, given the ambiguity inherent in the cards Blasius now finds to be clear,20/ the correction of execution errors by record holders is in effect what Blasius is urging. Similarly, if the Court looks to extrinsic evidence, then it cannot ignore the affirmative evidence of serious misconduct which has been developed in this case, and which demonstrates that the integrity of the election process has been seriously undermined. Indeed, as the Delaware Supreme Court has held: "the registered holder of stock will not be recognized in equity as entitled to vote the same in hostility to the wishes and desires of its owners". In re Canal Constr. Co., 182 A. at 548; see also Bay Newfoundland Co. v. Wilson & Co., Del. Supr., 37 A.2d 59, 63 (1944).

Vice Chancellor Hartnett recently applied this long-standing principle to a consent executed pursuant to 8 Del. C. §228, holding:

> "[a]lthough only those who hold shares of record or those who hold proxies for shares of record may execute a consent pursuant to 8 Del. C. §228, it would be inequitable to allow a holder of record who holds mere legal title to stock to act by consent in

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20/ Significantly, the conflicting cards which are at issue could have been, but were not, stamped "additional proxy" or words to that effect.

> a manner contrary to the wishes of the true owner. The registered holders of shares . . . cannot . . . be allowed to vote shares against the wishes of the equitable owner."

Freeman, slip op. at 19.

Nowhere is the importance of this equitable rule clearer than in a consent solicitation, where, as Blasius itself has repeatedly stressed, unlike a proxy contest, "[n]ot returning a consent . . . is the same as a vote to support . . . management." See DX VVV. In a proxy contest, all sides solicit votes from stockholders, and the winner of the contest is the party obtaining a plurality of the votes cast. Thus, a stockholder who fails to vote abstains in the classic sense: he removes himself from the process, expressing an opinion as to neither side.

Such a decision is simply not possible in a consent solicitation, where the party soliciting consents must obtain an absolute majority of all outstanding shares. Thus, there is no such thing as an abstention. A vote to withhold consent is a vote for management. A vote to revoke consent is a vote for management. Finally, and most importantly, the absence of a vote is a vote for management. Thus, in a consent solicitation, no one can properly assume from stockholder silence or the absence of clear instructions from a stockholder anything other than a position that is against the consent. Given these circumstances which are unique to a consent contest, this Court should not permit the counting of alleged oral indications of consent from individuals who expressed their support for management by not voting. Indeed,

this must particularly be the case where, as here, Atlas has uncovered affirmative evidence that several of these alleged oral indications of consent never took place.

The following summary is intended to assist the Court in reviewing the evidence relating to the tabulation of consents. The specific number of affected consents are presented in the chart annexed as Exhibit A.[21/]

B. STATE STREET BANK[22/]

IECA performs the "back-office" function on behalf of its bank and brokerage house customers. It tabulates consents and revocations from beneficial owners of stock which are the customers of the banks and brokerage houses. Typically, IECA will determine from each of its customers how many beneficial owners that customer represents, and will then order the requisite amount of solicitation material. IECA then mails that material directly to the beneficial owners, receives cards back from the beneficial owners indicating how each wishes to vote, tabulates the results on an institution by institution basis, and executes two cards on behalf on each of its customers -- one each for management and for the insurgents -- which summarizes the results of IECA's tabulation. In this way, IECA's customers typically remain uninvolved in proxy and

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21/ This chart, with minor modifications, was presented to the Court for purposes of oral argument on May 12, 1988.

22/ The effect of correcting this error is demonstrated on the third line of Section III of the chart annexed as Exhibit A.

consent contests other than to report to IECA the number of beneficial holders it represents. (Pasfield Dep. at 12-19.)

In a relatively small number of instances, beneficial holders who owned stock through one of IECA's customers contacted their bank or broker directly (and in most instances only orally), and instructed that institution how to vote. The institution, in turn, called IECA to relay the information and also sent to IECA a written confirmation of the call. IECA then included this information in its tally. (Pasfield Dep. at 92-114.)

IECA admits having committed an execution error in transferring the information from one of its verbal vote forms and the written confirmation of voting instructions for that form onto one of the cards it executed and forwarded to Blasius on behalf of State Street Bank. When this admitted error is corrected, Blasius has failed, even under its own interpretation of the tally results, to deliver a sufficient number of consents for each of its proposals.

In order to understand IECA's error, the Court need compare three exhibits: DX RRRR, DX SSSS and DX TTTT. Each of these exhibits has as its first page an IECA "verbal vote form" recording an oral vote from the State Street Bank. The second page is State Street Bank's written confirmation of that vote.

IECA's error is evident from both the verbal vote form and the written confirmation.

Looking at the verbal vote forms in each of the three exhibits, the following notation appears under the column "vote":

(i) On DX RRRR: "For 1-5 voting on white card";

(ii) On DX SSSS: "For 1-5 voting on white proxy card"; and

(iii) On DX TTTT: "Agst 1-5 white proxy card."

(emphasis added). Based on these forms, IECA ultimately executed two cards on behalf of State Street Bank, both of which recorded all three verbal vote forms as indications of consent: one card showed 35,959 shares consenting (the 25,245 shares on DX RRRR plus the 10,714 shares on DX SSSS), and the second, marked "additional proxy," showed 26,890 shares consenting. (DX OOO, p. 3; DX QQQ, p. 12.) Clearly one of these two cards -- and the evidence shows it was the latter -- was an error.

As further evidence that State Street Bank instructed IECA to vote 26,890 shares against the Blasius proposals, one can look to the second page of the three exhibits. On the first two of these confirmation forms, which State Street Bank used to confirm its oral vote to IECA, State Street Bank has marked the boxes labelled "For." (DX RRRR; DX SSSS.) On the third, however, State Street Bank has marked "Against." (DX TTTT; see also DX EE, p. 5; DX FF.) Indeed, both State Street Bank and IECA have testified that IECA made an error when it executed a card for 26,890 shares and marked that card

as consenting. (Brown Dep. at 30-33; Pasfield Dep. at 240-250; DX ZZZZ.) The 26,890 shares should have been voted against the Blasius proposals. This error, by itself, is sufficient to swing the current contest under any possible interpretation of the vote count; accordingly, it cannot be ignored.

C. N.B. CLEARING[23/]

IECA counted 1,500 shares for which N.B. Clearing had authority to vote without any instruction whatsoever. The written confirmation that N.B. Clearing sent to IECA regarding oral indications of consent N.B. Clearing allegedly received from its customers contains only typed account numbers and share amounts. In the hands of IECA, however, that same document included two additional handwritten account numbers and share amounts: account number 13115543 for 1,500 shares and account number 1311583 for 100 shares. (DX OOOO; DX UUUU.) The 1,500 shares were included in IECA's final vote tabulation. (Id. at p. 3; Pasfield Dep. at 187-189.) However, N.B. Clearing did not give any instructions with regard to these shares. (Gerbasio Dep. at 59.) Further, Frank Gerbasio of N.B. Clearing testified that if instructions were given, only he would have given them and he did not do so. (Gerbasio Dep. at 58-59.) Charles Pasfield of IECA was also unable to identify the source of the handwritten additions. (Pasfield Dep. at 188-189.) Accordingly, whatever else the Court may

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23/ The effect of correcting this error is demonstrated in the fourth line of Section III in the chart annexed as Exhibit A.

conclude with respect to N.B. Clearing, it is clear that those consents must be reduced by at least 1,500 shares.

D. A.G. EDWARDS[24/]

A.G. Edwards returned four cards, two each for management and for Blasius. The two management cards were dated February 19 and March 4, respectively. (DX GGG; DX HHH.) Both of the March 4 cards were stamped "PREVIOUS PROXY WILL NOT BE COUNTED." (DX HHH; DX III.) In tabulating the total number of consents executed by A.G. Edwards, the inspectors summed the number of consents given on Blasius' February 19 card (DX GGG), the number of consents given on Blasius' March 4 card (DX HHH) and the number of consents given on management's February 19 card (DX FFF). The March 4 management card was received too late and was therefore not considered in tabulating consents. (DX QQQ.)

In counting the February 19 Blasius card evidencing consent for 2,425 shares on all propositions in addition to the March 4 Blasius card evidencing consent for 12,099 shares on all propositions and stamped "PREVIOUS PROXY WILL NOT BE COUNTED," the inspectors acted contrary both to the instructions on the face of the card, (DX HHH), and to the intent of A.G. Edwards (the record shareholder). (Hubbs Dep. at 67-69.) Thus, the total number of shares tabulated by the inspectors as consents from A.G. Edwards should be reduced by 2,425 shares.

24/ The effect of correcting these errors is demonstrated in the fifth and sixth lines of Section III in the chart annexed as Exhibit A.

Further, the inspectors also erred in adding the 460 shares consenting on proposition 1, 480 shares on proposition 2, 420 shares on proposition 3, and 440 shares on proposition 4 of the February 19 management card, to the 12,099 shares consenting for all proposals on the March 4 opposition card because some of the shares counted as consenting on the February 19 management card may also be counted as consenting on the March 4 Blasius card and because some of the shares counted as consenting on the February 19 management card may have been revoked by the March 4 Blasius card. (Hubbs Dep. at 69-70.) Thus, the A.G. Edwards total should be further reduced by 440, 460, 420, 480 and 480 shares on each of proposals 1-5, respectively.

E. NORTHERN TRUST[25/]

A February 24 Blasius card evidencing consent for 16,700 shares on all propositions, (DX RR), was counted in addition to a later dated (March 4) Blasius card evidencing consent for 18,820 shares on all propositions. (DX SS.) Because the resulting total (35,520) exceeded Northern Trust's total position in Atlas of 21,159 shares (Froehlich Dep. at 53-54), the inspectors tabulated Northern Trust as consenting for its total position of 21,159 shares. (Shapiro Dep. at 109-112; DX QQQ.) This was clearly an error, as Northern Trust's overvote made obvious that its second card was intended to revoke the first. See Schott, 154 A.2d at 223. Further,

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25/ The effect of correcting this error is demonstrated in the seventh line of Section III in the chart annexed as Exhibit A.

Northern Trust intended its March 4 card to revoke the February 24 card. (Froehlich Dep. at 51-53.) Thus, the total number of consents from Northern Trust tabulated by the independent inspectors should be reduced by 2,339 shares.

F. E.F. HUTTON[26/]

E.F. Hutton returned both a Blasius and a management card dated March 2. (DX XX; DX YY.) The management card was marked as follows:

1)	-240-	FOR	-5873-	AGST. -110-	ABS.
2)	-200-	FOR	-6023-	WITHHOLD	
3)	-240-	FOR	-5873-	AGST. -110-	ABS.
4)	-240-	FOR	-5873-	AGST. -110-	ABS.

(DX YY.) The inspectors routinely counted "for" votes on management cards as votes for management, and "against" votes on management cards as votes against management (i.e., for Blasius). (DX QQQ.)

The face of this card, however, makes clear that Hutton intended "agst." to mean against Blasius' proposals and not against management. This is clear not only from the vote itself (this card was unique as a management blue card expressing more than 20 times the number of shares consenting as not consenting), but because on proposition 2 Hutton printed "withhold," which clearly cannot mean consent. Further, the evidence shows that Hutton in fact intended the "for" votes on the management card to be votes for Blasius' proposal and the "against" votes on the management card to be votes against the

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26/ The effect of correcting these errors is demonstrated in the eighth and ninth lines of Section III in the chart annexed as Exhibit A.

Blasius proposal. (Hope Dep. at 31, 39-44.) Thus, the inspectors should not have counted the shares in the "against" column on the blue management card returned by E.F. Hutton as consents, and the Blasius total should therefore be reduced by 5,633 shares on proposition 1-3, and by 5,823 shares on propositions 4 and 5.

Further, Hutton erroneously counted as consenting on its March 2 Blasius card, a card from a beneficial holder for 20 shares marked "consent withheld" on all propositions. (DX XX; DX WWW; Hope Dep. at 55-61.)

G. PAINE WEBBER[27/]

Paine Webber erroneously counted a card from a beneficial shareholder for 125 shares and marked "Abstain" on propositions 4 and 5 as evidencing consent on all propositions. (DX OO; DX PP; Corbisiero Dep. at 30-31.)

27/ The effect of correcting this error is demonstrated in the tenth line of Section III in the chart annexed as Exhibit A.

H. B.C. CHRISTOPHER[28/]

The conduct of B.C. Christopher Securities Co. ("B.C. Christopher") presents a particulary serious and disturbing sequence of events which this Court should not condone. B.C. Christopher, which is neither a record nor a beneficial stockholder of Atlas common stock (Speir Dep. at 6), sent to Securities Settlement Corporation ("Securities Settlement"), a clearinghouse with authority to vote Atlas stock by virtue of an Omnibus Proxy executed by Cede & Co. ("Cede") (Taelman Dep. at 16), a telex purporting to give Securities Settlement the authority to "vote the 33,000 plus shares of Atlas Corp. in favor of ... Blasius." (DX RRR; Speir Dep. at 6-7.) At the time this telex was sent, B.C. Christopher did not know how many shares its customers owned; the figure was given to Gordon Speir, a stockbroker, by plaintiff Warren Delano. (Speir Dep. at 7-9, 23-24.)

Securities Settlement rejected this attempt to vote all shares, and requested a list of stockholders consenting. (Taelman Dep. at 5-7, 9.) B.C. Christopher then provided Securities Settlement with a list containing the names and positions of all customers serviced in its Denver office who B.C. Christopher believed owned stock aggregating 23,800 shares. (DX SSS; Speir Dep. at 9-10; Taelman Dep. at 7.) Actually, the customers owned 24,100 shares. (Pasfield Dep. at 172-177, DX QQQQ.)

28/ The effect of correcting these errors is demonstrated in Sections IV and VI of the chart annexed as Exhibit A.

Securities Settlement, based only upon this list, directed IECA to vote the positions of all of these shareholders as consenting to the Blasius proposals. All customers were tabulated by IECA as consenting for their full share amounts. (Id.; Pasfield Dep. at 250-251; DX ZZZZ.) Whatever B.C. Christopher may have instructed Securities Settlement to do, it is clear, based upon the sworn testimony of a number of B.C. Christopher customers, that they never gave B.C. Christopher any authority to consent for Blasius. Not surprisingly, B.C. Christopher, confronted with this sworn proof from a number of different people, says that it somehow received instructions from each of its customers. B.C. Christopher has no records of any type, however, memorializing any oral instructions from any of its customers. (Speir Dep. at 28; Bucher Dep. at 14-15.)

Specifically, the following individuals, with the stated share amounts, have testified that they never gave anyone at B.C. Christopher authority to vote their shares:

(i) Louis De Grave, 2,150 shares (De Grave Dep. at 5-6);

(ii) Forrest A. Fried, 1,000 shares (Freid Dep. at 6-7);

(iii) Harry Bird, 100 shares (Bird Dep. at 4-5);

(iv) Gary Barta, 100 shares (Barta Dep. at 5-8);

(v) Rupert O'Brien, 100 shares (O'Brien Dep. at 4); and

(vi) Dwight Anderson, 100 shares (Anderson Dep. at 4).

Moreover, Charles Pasfield of IECA testified that IECA received blue management cards withholding consent from Barta, Fried, and Arnold Lamm, a beneficial holder of 300 shares of Atlas stock (Pasfield Dep. at 167-169), before the B.C. Christopher instructions were received, and that the later oral instructions overrode the earlier dated cards filled out and mailed in by the stockholders themselves. In addition, Marianne O'Brien (100 shares), Arnold Lamm and Lucia De Grave (1,500 shares), were each unavailable for or refused to give deposition testimony; however, each has on more than one occasion denied having given B.C. Christopher authority to vote his or her shares. (DX CCCCC; DX DDDDD.)

Further, although some of B.C. Christopher's customers did in fact deliver white Blasius cards to IECA marked consent (Pasfield Dep. at 221-233), in addition to those previously mentioned, IECA did not receive cards indicating consent to Blasius' proposals from the following:

(i)	Calloway	-	300 shares
(ii)	Peters	-	400 shares
(iii)	Powell	-	9,100 shares
(iv)	Ross	-	400 shares
(v)	Summers	-	1,800 shares
(vi)	Clyde	-	200 shares
(vii)	Schiller	-	350 shares
(viii)	Hatfield	-	200 shares
(ix)	Miller	-	500 shares
(x)	Small	-	100 shares
(xi)	Neeb	-	300 shares
(xii)	Weaver	-	200 shares

Given B.C. Christopher's conduct, there is no credible reason to believe that these individuals consented. B.C. Christopher's egregious conduct should not be countenanced. It should be nullified and its oral instructions

should be discarded.[29] Each of its customers received cards on which they could vote to consent or to withhold consent, or they could have chosen not to participate. Various customers chose each of these options. Their action or inaction, not B.C. Christopher's unauthorized conduct, should be the recognized action.

I. TWEEDY BROWNE[30]

In a strikingly similar pattern to the B.C. Christopher situation, Tweedy, Browne Company ("Tweedy"), an investment advisor, telephoned N.B. Clearing Corp. ("N.B. Clearing"), the party with authority to vote, with a list of beneficial holders of Atlas stock allegedly consenting to Blasius' proposals. (Gerbasio Dep. at 7-34.) However, Bruce Weiller (100 shares), one of the Tweedy customers who was on that list, never gave any such consent. (Weiller Dep. at 6.) Further, in telephone conversations with Judith Thomas, a D.F. King telephone solicitor, four other Tweedy customers, Ann Thayer (400 shares), Walter Lippincott (180 shares), Anne Boylan (85 shares) and Paul Hertenstein (375 shares), have each denied giving Tweedy the authority to vote their shares. (DX DDDDD.) As with B.C. Christopher, attempts to perfect the record on this question have been hampered by intervening

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29/ This is especially true where, as here, the brokers from B.C. Christopher whose conduct is at issue contacted beneficial stockholders after the fact in an apparent attempt to alter the record. (Bird Dep. at 4-5; O'Brien Dep. at 5.)

30/ The effect of correcting these errors is demonstrated in Section IV of the chart annexed as Exhibit A.

telephone calls from Tweedy to its customers. (Ford Dep. at 42-50.)

J. PARTIALLY MARKED CARDS[31/]

Several stockholders marked some but not all propositions on their white Blasius cards. (DX VVVV.) Typically, a stockholder marked the proposition directly above the signature line, and left blank the boxes on the reverse side of the card. (Id.) The proposition marked was marked "consent" on some cards; on a significant number of occasions the proposition was marked "consent withheld" or "abstain." (Id.)

Those partially marked cards marked "consent withheld" or "abstain" are clearly not consents for the unmarked propositions solicited. Indeed, deposition testimony has established that a number of these stockholders did not consent on any proposals. Specifically, the following stockholders who marked their white cards "consent withheld" or "abstain" have testified that they did not intend to consent on the other unmarked propositions:

Account	Shares	Unmarked Propositions	Citation
Garfield	240	1 - 4	Garfield Dep. at 5-6; DX UU.
Kapner	3	4 - 5	Kapner Dep. at 4-5; DX GG.
Whorton	22	1 - 4	Whorton Dep. at 4-5; DX II.

31/ The effect of correcting these errors is demonstrated in Sections IV and VII of the chart annexed as Exhibit A.

Todd	35	4	Todd Dep. at 4-5; DX HH.
Bruno	200	1 - 4	Bruno Dep. at 5-7; DX KK.
Repaire	200	1 - 3	Repaire Dep. at 5-5; DX JJJ.
Royquis	400	1 - 4	Gagnon Dep. at 10-12; DX TT.
Schiller	28	1 - 4	Schiller Dep. at 4-7; DX DD.
Zaehner	200	1 - 4	Zaehner Dep. at 4-6; DX UUU.
Riches	300	2	Riches Dep. at 5-10; Pasfield Dep.at 199-200.
Mukai	100	1 - 3	Mukai Dep. at 4-6; Pasfield Dep. at 204.

Nevertheless, these unmarked propositions on white Blasius cards were counted as consents. (See, e.g., Shapiro Dep. at 113-117; Carrozzo Dep. at 88-98.) Accordingly, at a minimum, the unmarked propositions listed above should be reduced by the indicated amounts.

Moreover, nothing in Blasius' solicitation material suggested that partially marked, as opposed to unmarked, cards would be deemed a consent to Blasius' proposals. Blasius' instructions stated only that unmarked cards would be treated as consents; the instructions said nothing about partially marked cards containing unmarked propositions on cards that were clearly marked. (DX VVVV.)

Indeed, Blasius itself believed that partially marked Blasius white cards would only be deemed as consenting to all proposals if the card was unmarked but not if it was partially

marked. For example, Kathleen B. Horne, a lawyer for Blasius, called six stockholders who returned partially marked cards before those cards were tabulated in order to obtain their approval to check the "consent" box on those propositions for which the stockholder did not indicate any intent. (Horne Dep. at 4-9.) Clearly, this exercise would have been unnecessary if unmarked propositions on a partially marked card were truly an indication of consent.

Interestingly, two of the six individuals whom Horne called declined to give Horne authorization to change their cards. (Horne Dep. at 23-29.) Curiously, Horne kept no record of those individuals who declined to give her authorization to change their votes. (Horne Dep. at 7, 23-24; DX ZZ; DX AAA; DX BBB; DX CCC.) Thus, Blasius cannot now be heard to claim that unmarked propositions ought to be counted as consenting.

For the Court's convenience, the partially marked cards other than those previously discussed are summarized in Section VII of the chart annexed hereto as Exhibit A. The cards have been divided according to whether they were tabulated by the inspectors or whether they were tabulated by a bank/broker or IECA. Each of these two categories is then divided according to how the cards were marked: consent, withhold consent or abstain, or a combination of the above. The cards themselves, to the extent they were available, are collected in DX VVVV. To the extent the cards were not available, Charles Pasfield of IECA has testified as to the existence and configuration of each, including cards from

objecting beneficial owners ("OBOS"). (Pasfield Dep. at 190-211.)

K. JOINT TENANTS[32/]

Several stockholders, including petitioners Michael Lubin and William Shulevitz, held Atlas stock as joint tenants. (DX MMM.) In some of these situations, however, fewer than all the joint tenants signed the consents. Specifically, the following accounts contained only the indicated signatures:

Account	Shares	Signature	Citation
William Shulevitz & Michael Lubin	16,900	Michael Lubin	DX MMM; DX NNN, p. 4
M. Edward Maule & Joan S. Maule, Trustees	1,000	M. Edward Maule	DX OO, p. 5
Joseph Skrypocski & Ann Marie Skrypocski	100	Joseph Skrypocski	DX OO, p. 5
Josephine Schofield, Harry J. Schofield & Mary Lou Bloom	20	Josephine Schofield	DX WWW, p. 17
William Kroll & Harriet Kroll	3	William Kroll	DX NN

These consents were counted for their full share amounts. (Carrozzo Dep. at 108-109; Corbisiero Dep. at 28-30; Marzella Dep. at 7-25; Hope Dep. at 51-55.) However, in a consent solicitation (as distinguished from a proxy contest), cards signed by less than all joint tenants are not to be counted for their full share amounts. Cook v. Pumpelly, Del.

32/ The effect of correcting these errors is demonstrated in Section V of the chart annexed as Exhibit A.

Ch., Nos. 7917 & 7930, Berger, V.C. (May 24, 1985) reprinted in 11 Del. J. Corp. L. 208. Rather, only the signing co-owner's proportional interest in the shares is to be counted. (Id.) Accordingly, the number of shares counted from Lubin and Shulevitz should be reduced by 8,450, the number of shares counted from the Maules should be reduced by 500, the number of shares counted from the Skrypocskis should be reduced by 50, the number of shares counted from the Schofields and Bloom should be reduced by 14, and the number of shares counted from the Krolls should be reduced by one.

* * *

In conclusion, therefore, it is clear that under any possible interpretation of the vote count Blasius has failed to obtain a sufficient number consents for each of its proposals. First, Blasius failed according to the inspectors' certification. Second, Blasius still fails even after the inspectors' results are modified by their own admitted error. Third, Blasius fails after extrinsic evidence is considered, regardless of whether or not that evidence is limited to execution errors made by record holders or their proxies. Accordingly, Blasius failed to get a sufficient number of consents with respect to each of its proposals.

POINT III

CONSENTS DELIVERED IN FAVOR OF BLASIUS PROPOSAL 3 ARE NULL AND VOID BECAUSE DIRECTORS OF A CLASSIFIED BOARD MAY NOT BE REMOVED WITHOUT CAUSE

Blasius Proposal 3 called for Atlas stockholder approval to the removal "without cause from the Company's Board of Directors [of] Messrs. Devaney and Winters". (DX VVV, p. 17.) Consents delivered in favor of Proposal 3 should be declared null and void because the removal without cause of directors of a classified board is not an action that may be taken at an annual or special meeting of Atlas stockholders, as required for any action taken by consent pursuant to the express terms of 8 Del. C. § 228(a).

As explained in detail in our pretrial brief, Section 141(d) of the Delaware General Corporation Law permits, and Article Seventh of Atlas' Certificate of Incorporation provides for, a classified board. See 8 Del. C. § 141(d); PX 16. As a result, "unless the certificate of incorporation otherwise provides, . . . shareholders may effect such removal [of directors] only for cause." 8 Del. C. § 141(k). Absent a provision in the Atlas Certificate of Incorporation to the contrary (and no such provision exists, PX 16), even a majority of Atlas stockholders may not remove classified directors other than for cause. See Defendants' Pretrial Brief at 38-45. Blasius failed to point to any provision in the Atlas Certificate of Incorproation that affirmatively provided for the removal without cause of Atlas' directors.

POINT IV

BLASIUS FAILED TO DELIVER ANY CONSENTS WITHIN THE STATUTORY PERIOD FOR PROPOSALS 2 AND 4

Blasius delivered to Atlas its first consent on December 30, 1987 (the "First Consent") and its second consent on January 7, 1988 (the "Second Consent"). (PX 3, pp. 9-11; DX X.) At no time between December 30, 1987 and March 6, 1988, did Blasius purport to revoke the First Consent. Moreover, the First and Second Consents contained two identical proposals: what Blasius' solicitation material (DX VVV) labelled as Blasius Proposal 2 (amendment of the Atlas By-Laws to increase the size of the Atlas Board from seven to nine members) and Blasius Proposal 4 (the election of eight Blasius nominees to the Atlas Board). Compare PX 3, pp. 9-11 with DX X.

Although the governing statute expressly provides that "no written consents shall be effective to take the corporate action referred to therein unless within sixty days of the earliest consent delivered . . ., written consents signed by a sufficient number of holders or members to take action are delivered to the corporation", 8 Del. C. § 228(c), Blasius does not purport to have delivered a sufficient number of consents as to Blasius Proposals 2 and 4 until March 6, 1988. This date is well beyond the sixty day period that commenced as to Proposals 2 and 4 at the time Blasius delivered the First Consent on December 30, 1987.

Blasius offers two arguments in response, neither of which is convincing. First, Blasius contends that the phrase

"corporate action referred to therein" speaks to the entire consent as delivered and not to the individual proposals contained therein. See Petitioners' Mem. at 79-80. Thus, under Blasius' strained reading of the statute, a proponent of a consent can continuously supplement the sixty day period by adding or subtracting a proposal to those originally included in the first consent delivered. The possibilities for abuse are, of course, endless. The simple fact remains that although there are material differences between the First and Second Consents, there are no differences, material or otherwise, between what the Blasius solicitation material labelled as Blasius Proposals 2 and 4 as those proposals were contained in the First and Second Consents. Indeed, the language of each proposal is identical in both consents.

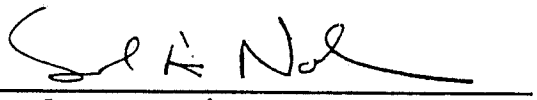
Second, Blasius seeks to prevent the Court from resolving the legal issue presented by arguing that Atlas is estopped or otherwise barred under the doctrine of laches from now raising this argument. However, as Blasius itself notes, both estoppel and laches require that Blasius changed its position to its detriment in reliance upon conduct of Atlas. See Petitioners' Mem. at 82 ("[e]stoppel arises where a party by his conduct intentionally or unintentionally leads another, in reliance upon that conduct, to change position to his detriment"; "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") (emphasis added).

Ignored by Blasius is the simple fact that there has been a total failure of proof on Blasius' part that it or anyone else changed position in reliance on Atlas' conduct. Although Blasius recognized that an element of its estoppel or laches defense was that it had detrimentally changed its position as a result of Atlas' conduct, it failed to offer any evidence to prove that necessary element. Having failed to meet its burden of proof on the affirmative defenses of estoppel and laches, Blasius cannot avoid the fact that consents delivered in favor of Blasius Proposals 2 and 4 are null and void because the statutorily mandated sixty day period expired prior to the delivery of a sufficient number of consents in favor of either proposal.

CONCLUSION

For the foregoing reasons, the Atlas defendants respectfully request that judgment should be entered declaring (i) that Messrs. Devaney and Winters were validly elected to the Atlas Board of Directors, cannot be removed without cause, and that any consents expressed, solicited or received for such purpose are void and of no force and effect; and (ii) that signed written consents delivered by Blasius and other Atlas stockholders on or about March 7, 1988 did not constitute the votes of a majority of the holders of outstanding Atlas common stock entitled to vote in favor of any of the five proposals for which Blasius solicited consents.

Dated: June 6, 1988



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 6, 1988, two copies of the foregoing Defendants' Post-Trial Brief were served by the undersigned on the following attorney of record at the address indicated below:

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