IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| UNOCAL CORPORATION, a Delaware corporation,<br><br>Defendant Below-Appellant,<br><br>v.<br><br>MESA PETROLEUM CO., a Delaware corporation, MESA ASSET CO., a Delaware corporation, MESA EASTERN, INC., a Delaware corporation, and MESA PARTNERS II, a Texas partnership,<br><br>Plaintiffs Below-Appellees. | § | No. 152, 1985 |

O R D E R

Submitted: May 2, 1985
Decided: May 2, 1985

Before McNEILLY, and MOORE, Justices. (Constituting the Qualified and Available Members of the Court)

This 2nd day of May, 1985, it appearing that:

1) On April 29, 1985 the Court of Chancery temporarily restrained the defendants from proceeding with an offer by Unocal Corporation (Unocal) to purchase certain shares of Unocal stock (the exchange offer) unless the plaintiffs are permitted to participate in the exchange offer to the same extent and in the same manner as all other Unocal shareholders.

2) Thereafter, Unocal filed an application in the Court of Chancery to certify this interlocutory appeal to us pursuant to Supreme Court Rule 42. By order dated May 1, 1985

the Vice-Chancellor declined such certification on the grounds that the trial court's decision does not decide a legal issue of first impression, and is not one as to which the decisions of the Court of Chancery are in conflict.

3) In its decision of April 29, 1985, issuing the temporary restraining order, the trial court principally relied upon the unreported decision of Fisher v. Moltz, Del. Ch. No. 6068, Hartnett, V.C. (December 28, 1979) reprinted in 5 Del. J. Corp. L. 530 (1980). On the basis of Fisher the trial court concluded that all shareholders of a Delaware corporation must be treated equally, and if not, there must be a proper business purpose for such action coupled with concurrent benefits flowing to the corporation, its shareholders, and any shareholder with whom the corporation intends to deal on a selective basis.

4) By failing to include the plaintiffs within Unocal's exchange offer the trial court concluded that such benefits as arose from the transaction ran to Unocal shareholders other than plaintiffs. Specifically, the Court of Chancery found that even if Unocal is "able to prevail in establishing a proper corporate purpose for the selective exchange offer, it is unlikely that it will be able to prevail on the issue of the overall fairness of the offers' exclusion" of plaintiffs. Accordingly, Unocal has been required to establish that the selective exchange offer is fair to all the shareholders, including plaintiffs.

5) Based on the record before her, the Vice-Chancellor concluded that it was "unlikely" that Unocal could meet that

burden. Finally, in balancing the hardships the trial court concluded that the potential harm to Unocal and its shareholders by plaintiffs' attempted take-over does not outweigh the potential harm to plaintiffs.

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

7) Ordinarily, no appeal lies from an order in Chancery which is discretionary and preliminary, intended merely to preserve the status quo, and not determinative of substantive rights. Martin v. American Potash & Chemical Corp., 92 A.2d at 298. By its terms the Chancery decision before us does more than maintain the status quo pending a final determination of the issues. The decision is clearly determinative of substantive rights of both the plaintiffs and the defendants. If the question of law has been erroneously decided, the defendants' rights clearly have been prejudiced. Necessarily, the trial court's decision determined the main question of

law, then at issue, against the defendants. We are satisfied that it is an appealable order. Martin v. American Potash & Chemical Corporation, 92 A.2d at 298. It meets the criteria of Rule 42(b), and dealt with a question of law of first instance in this State, ie, the validity of Unocal's exchange offer as a defensive take-over technique. However, on May 8, 1985 the Court of Chancery will hold a preliminary injunction hearing relating to this and other issues. Presumably, there will be a more complete record upon which the trial court and this Court can address this important subject.

8. In our opinion the Vice-Chancellor should have a full opportunity in the first instance to consider the issues before her with the benefit of an enlarged record. Furthermore, on the papers before us we cannot determine whether the parties have articulated the following issues which the Vice-Chancellor should have an opportunity to consider:

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

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

c) If so, may the directors of Unocal in the proper exercise of business judgment employ the exchange offer to protect the corporation and its shareholders from such tactics? See Pogostin v. Rice, Del. Supr., 480 A.2d 619 (1984).

d) If it is determined that the purpose of the exchange offer was not illegal as a matter of law, have the directors of Unocal carried their burden of showing that they acted in good faith? See Martin v. American Potash & Chemical Corp., 92 A.2d at 302.

9. In view of the hearing scheduled for Wednesday, May 8, 1985, on the plaintiffs' application for a preliminary injunction, the parties will have a better opportunity to develop a record upon which this Court may ultimately address the issues. Thus, we consider it premature to act upon the defendants' application for an interlocutory appeal at this time. Until completion of the preliminary injunction hearing, and a decision from the trial court, action on the acceptance of this interlocutory appeal will be deferred.

NOW, THEREFORE, IT IS ORDERED that the hearing on a preliminary injunction scheduled before the Court of Chancery on Wednesday, May 8, 1985, shall proceed, and until the issues pending before the Court of Chancery at the May 8, 1985 hearing are determined by that court, action on the application for

the certification for an interlocutory appeal, pursuant to Supreme Court Rule 42, shall be

DEFERRED.

BY THE COURT:

A. G. Moore II

Justice