RICHARDS, LAYTON & FINGER
ONE RODNEY SQUARE
P. O. BOX 551
WILMINGTON, DELAWARE 19899
TELEPHONE (302) 658-6541
TELECOPIER (302) 658-6548

LOUIS J. FINGER
EDMUND N. CARPENTER, II
JAMES T. McKINSTRY
E. NORMAN VEASEY
MAX S. BELL, JR.
RICHARD J. ABRAMS
CHARLES F. RICHARDS, JR.
THOMAS P. SWEENEY
PIERRE S. DU PONT IV
ROBT. H. RICHARDS, III
R. FRANKLIN BALOTTI
MARTIN I. LUBAROFF
JANE R. ROTH
RICHARD G. ELLIOTT, JR.
WENDELL FENTON
ALLEN M. TERRELL, JR.
GLENN C. KENTON
ROBERT MEYER
RICHARD G. BACON
STEPHEN E. HERRMANN
JULIAN H. BAUMANN, JR.
DANIEL L. KLEIN
DONALD A. BUSSARD
WILLIAM J. WADE
THOMAS L. AMBRO

PAUL M. ALTMAN
THOMAS A. BECK
C. STEPHEN BIGLER
WILLIAM W. BOWSER
JESSE A. FINKELSTEIN
NEIL B. GLASSMAN
KAREN L. JOHNSON
DANIEL J. KAUFMAN
ROBERT J. KRAPF
MICHAEL M. LEDYARD
ERIC A. MAZIE
DARRELL J. MINOTT
SAMUEL A. NOLEN
JOHN A. PARKINS, JR.
JOHN J. SCHREPPLER, II
JULIE M. S. SEITZ
GREGORY V. VARALLO
ROBERT W. WHETZEL
GREGORY P. WILLIAMS
HELEN L. WINSLOW

OF COUNSEL
WILLIAM E. WIGGIN

April 26, 1985

The Honorable Carolyn Berger
Court of Chancery
Public Building
Wilmington, Delaware 19801

Re: Mesa Petroleum Co., et al. v.
Unocal Corp., et al., C.A. No. 7997

Dear Vice Chancellor Berger:

This letter is the response of plaintiffs in the captioned action to the Answering Brief of Defendant Unocal Corporation in Opposition to Plaintiffs' Motion for Interim Injunctive Relief, filed this day at 9:00 a.m. In light of the time constraints on both the Court and plaintiffs, we will not attempt to respond to each of the assertions in defendants brief, but rather will highlight the most crucial weaknesses in defendants' argument.

Defendants attempt to divert this Court's attention from the sole issue to be presented to the Court today -- whether this Court will permit defendants to exclude Mesa

Partners II (the "Partnership") from Unocal's impending offer to purchase 50,000,000 shares of its stock in exchange for debt securities of $72 face value. Rather than attempting to justify the discriminatory aspect of its two-part self-tender (the "Amended Debt Tender"), defendants present today their argument that the director defendants' decision to initiate a self-tender in response to plaintiffs' tender offer was a proper defensive maneuver. Indeed, the first substantive argument of defendants' brief (Ans. Br. 13-17) makes no mention of the discriminatory exclusion of the Partnership from the Amended Debt Tender, speaking instead of the supposed merits of the Unocal self-tender as a whole as a defense to plaintiffs' tender offer.

Thus, not surprisingly, defendants rely heavily on the business judgment rule in an attempt to justify the Amended Debt Tender. In fact, the business judgment rule has absolutely no application to the motion before the Court this afternoon. In Fisher v. Moltz, Del. Ch., C.A. No. 6068, Hartnett, V.C. (Dec. 28, 1979), reprinted in 5 Del. J. Corp. L. 530 (1980), reargument denied, Del. Ch., C.A. No. 6068, Hartnett, V.C. (Feb. 21, 1980), this Court explicitly stated the test which must be satisfied to justify discriminatory stock repurchases. The Court did not apply, indeed did not even mention, the business

judgment rule. Instead, contrary to the business judgment rule, which places upon the plaintiff the burden of proving illegality, the Court placed on the party seeking to justify a discriminatory repurchase the burden to demonstrate that each of the factors outlined in Fisher is satisfied. Thus, Fisher dictates that these defendants are not entitled to the presumption of propriety provided by the business judgment rule in their attempt to obtain this Court's approval of their plan to discriminate among the Unocal stockholders.*

Indeed, irrespective of Fisher v. Moltz, defendants are not entitled to invoke the business judgment rule. As the Supreme Court recently stated, the "protections [of the business judgment rule] can only be claimed by disinterested directors whose conduct otherwise meets the tests of business judgment." Aronson v. Lewis, Del. Supr., 473 A.2d 805, 812 (1984); see also Sterling v. Mayflower Hotel Corp., Del. Supr., 93 A.2d 107, 110 (1952) (where directors "stand on both sides of the transaction, they bear the burden of establishing its entire fairness, and it must pass the test of careful scrutiny by the courts"). The Court in Aronson defined interestedness as follows:

---

*Recognizing the futility of any such efforts, defendants make no attempt to reconcile the allocation of the burden of proof in Fischer with the business judgment rule.

> From the standpoint of interest, this means that directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally.

473 A.2d at 812.

Each of the Unocal directors has expressed his intention to tender into the Amended Debt Tender. (Nolen Aff., Ex. A at p. 2). Thus, each director stands on both sides of the Amended Debt Tender and will receive a personal financial benefit from tendering. They have in fact admitted as much. (Nolen Aff., Ex. A at p. 11) ("each of the present directors and officers of [Unocal] may be deemed to have a personal interest in the outcome of the [Unocal] offer..."). (See also Eamer Aff. at p. 12). Indeed, they stand to receive over $70,000,000 by the Amended Debt Tender. (Verified Second Amended Complaint ¶ 11). That personal financial benefit not only does not "devolve upon ... all stockholders generally," 473 A.2d at 812, but the defendant directors have affirmatively made it unavailable to the largest of the stockholders to whom their fiduciary duties flow.

Thus, the business judgment rule has absolutely no application here.* Rather than being entitled to a presumption of propriety with respect to their acts, defendants bear the burden of proving that (1) the discriminatory provision of the Amended Debt Tender serves some valid corporate purpose; and (2) the Amended Debt Tender does not unduly favor the remaining Unocal stockholders, including the director defendants, over the Partnership. In short, defendants must demonstrate that the Amended Debt Tender is fair to all Unocal stockholders. See Fisher v. Moltz, 5 Del. J. Corp. L. at 532; Fisher v. Moltz, slip op. at 1 (Feb. 12, 1980). They have failed to satisfy their burden.

Defendants' attempt to prove a proper corporate purpose for the discriminatory exclusion of the Partnership from the Amended Debt Tender is totally unsuccessful. Defendants' brief repeatedly states that selective repurchases designed to "defeat a hostile tender" serve a valid

---

*Additional factors operate to deny defendants the protection of the business judgment rule; namely, in approving the Amended Debt Tender the defendant directors acted for the sole or primary purpose of continuing themselves in office. Moreover, the defendant directors failed to fulfill their fiduciary duty of due care. Plaintiffs' arguments regarding those issues will be presented to the Court in conjunction with plaintiffs' motion for a preliminary injunction, currently scheduled for May 8, after development through discovery of a factual record.

corporate purpose. (Ans. Br. 18, 19). That principle, whatever its merits, is inapplicable to defendants' attempt to discriminate against the Partnership. Indeed, defendants' attempt to justify their discrimination against the Partnership by relying solely on Carter Hawley Hale Stores, Inc. v. The Limited, Inc., C.A. No. 84-2200-AWT (C.D. Cal. Apr. 17, 1984), and Pogo Producing Co. v. Northwest Industries, Inc., C.A. No. H-83-2667 (S.D. Tex. May 24, 1983). In fact, neither of those repurchases were discriminatory. The repurchases in Carter were made on the open market, not from select stockholders. The tender offer in Pogo was pro-rata and open to all stockholders.*

The admitted purpose of this aspect of the Amended Debt Tender, as opposed to the Debt Tender as a whole, is to increase the profit available to one group of stockholders by depriving another stockholder of any profit whatsoever. (Nolen Aff., Ex. A at 7). Indeed, in the sole paragraph of defendants' brief that speaks directly

---

*Indeed, one of Unocal's attorneys advised the Unocal board that "a tender offer from which some shareholders are excluded would be without close precedent ..." (Eamer Aff., Ex. A at p. 9). In light of defendants' failure to cite a single example of such a discriminatory tender offer, it is clear that no precedent exists for the discriminatory offer defendants will consummate, absent the intervention of this Court, in four days.

to the defendant directors' purpose in excluding the Partnership (Ans. Br. 20-21), defendants admit that the exclusion is designed solely to benefit the stockholders allowed to participate, including the defendant directors themselves, by depriving the Partnership of similar benefits. Defendants want more profit available for themselves and the chosen stockholders and less for the Partnership. Defendants also disapprove of the use they fear one stockholder will make of the profit to be made in the Debt Tender. Such discrimination among stockholders, for the sake of discrimination itself, finds no place in Delaware law.

In contending that the Amended Debt Tender does not unduly favor the director defendants and those stockholders permitted to tender, defendants have attempted to turn the issue before the Court on this motion for a temporary restraining order into something it is not, and for obvious reasons. The issue is not, as defendants would have it, the value of the consideration offered in the Amended Debt Tender, or of Unocal stock, or of Unocal as a whole. (Ans. Br. 22-23). The issue is whether the defendants legally or equitably can single out one of their 76,900 shareholders to deprive that single shareholder of rights and opportunities afforded the remaining 76,899. We submit that they cannot do so legally, and even if they

could no court of equity would countenance it. Compare Schnell v. Chris-Craft Industries, Inc., Del. Supr., 285 A.2d 437 (1971).

Thus, the valuation "evidence" defendants have put before the Court is beside the point and the Court need not consider it. It does not demonstrate a business purpose for the discrimination practiced here; it does not explain how such a discrimination can be said not to favor one group of stockholders over another; and it does not demonstrate the fairness of that discrimination. Indeed, recognizing the inherent unfairness of their discrimination, defendants do not even attempt to demonstrate that the Amended Debt Tender is fair to all Unocal stockholders. As stated in plaintiffs' opening brief, such a showing is required by Fisher v. Moltz and is the unavoidable consequence of the undisputed fact that the director defendants stand on both sides of the transaction under scrutiny. (Op. Br. 19-22). Notably, neither investment banking firm has offered its opinion that the offer is fair to all shareholders. Rather, they say it is fair to the shareholders receiving the consideration. See, e.g., Sachs Aff. at ¶ 32, and the opinions attached to the Original Debt Tender itself.

Moreover, the valuation "evidence" the defendants have sought to hide behind as a justification for this perversion of fiduciary trust is fundamentally deficient. It does not explain away the fact that by making the Amended Debt Tender the defendants have caused a fundamental change in Unocal by burdening it heavily with debt, thereby altering the character of the investment of all Unocal stockholders. This has particular significance in light of the fact that the favored stockholders -- that is, all stockholders except the Partnership -- will have the opportunity to convert some of their equity into debt, raising their status from common stockholders to senior creditors and enhancing the security of their investment in what will be a highly leveraged company. The Partnership is denied this opportunity. Indeed, not only is it denied the opportunity to enhance the security of its investment, its investment is made more risky by the leverage incurred in enhancing the value and security of the other stockholders' investment.

It will not do to say that the value of Unocal per share after the other stockholders are paid in the Amended Debt Tender will be equal to the value of the debt securities being paid to those stockholders. The individual defendants obviously do not believe that to be the case, or they would see no need to tender and to warn their stock-

holders to do so. What defendants are really saying is that all stockholders except the Partnership will get securities worth $72 per share, while the Partnership will be stuck with common stock that no one conceives will have a market value that high. That does not even come close to establishing the punctilio of fairness which these fiduciaries must prove.

In the end, the defendants' actions speak louder than their "evidence." They have said they will tender into the Amended Debt Tender; they have told their favored stockholders to do so; and they have denied the Partnership the right to do so against its will. Indeed, they have said that by discriminating against the Partnership Unocal is able to offer the other stockholders $2 more per share -- $2 they have taken from the Partnership's pockets and thrust into their own. (Third Tassin Aff., Ex. B). There is no precedent for such a discrimination, and there should be none.

Plaintiffs respectfully submit herewith the Third Affidavit of Sidney Tassin. Although time does not permit the full integration into this letter of the statements of fact contained in the Third Tassin Affidavit, plaintiffs

refer the Court to that affidavit for refutation of the factual assertions in the various affidavits submitted by defendants.

Finally, with respect to irreparable injury defendants purport to demonstrate the existence of an adequate remedy in money damages by conclusorily stating that damages from the discriminatory offer "could easily be quantified." (Ans. Br. 33). However, absent injunctive relief the discriminatory tender will go forward. That tender will continue to work its effect on the solicitation to postpone Monday's annual meeting. Obviously, faced with a non-discriminatory tender, more shareholders would vote for adjournment since fewer of their shares would be purchased in the lucrative company offer. Moreover, after next Tuesday Unocal will be purchasing shares and radically altering the capital structure of the company, effectively diluting the remaining shares both in terms of underlying asset value and market trading value. Absent immediate injunctive relief events will move forward and adequate relief will entail ordering a new annual meeting and a rescission of the thousands of transactions effected by the Amended Debt Tender. Such unscrambling of the eggs would be impossible.

For the reasons stated herein and in plaintiffs' opening brief, plaintiffs respectfully urge this Court to issue its Order granting the relief requested by plaintiffs.

Respectfully,

Charles F. Richards, Jr.

CFRjr/mec

cc: Register in Chancery
A. Gilchrist Sparks, Esquire