05/13/85 MESA PETROLEUM CO. v. UNOCAL CORPORATION

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BERGER, Vice Chancellor

Plaintiffs are seeking a preliminary injunction restraining an exchange offer commenced by defendant, Unocal Corporation ("Unocal"), as a defensive response to their ongoing efforts to takeover the company. Plaintiffs (collectively "Mesa") are Mesa Petroleum Co., a Delaware corporation ("Mesa Petroleum"), Mesa Asset Co., a Delaware corporation wholly-owned by Mesa Petroleum ("Mesa Asset"), Mesa Partners II, a Texas general partnership whose managing partner is Mesa Asset (the "Partnership") and Mesa Eastern, Inc., a Delaware corporation wholly-owned by the Partnership ("Mesa Eastern"). T. Boone Pickens, Jr. ("Pickens") is President and Chairman of the Board of Mesa Petroleum and President of Mesa Asset and controls the related Mesa entities. Defendants are Unocal and thirteen of its fourteen directors -- William F. Ballhaus, Claude S. Brinegar, Ray A. Burke, Robert D. Campbell, William H. Doheny, Richard K. Eamer, Fred L. Hartley, T. C. Henderson, Donald P. Jacobs, William S. McConnor, Peter O'Malley, Richard J. Stegmeier and Donn B. Tatum (collectively the "director defendants"). Mesa contends that the Unocal exchange offer must be enjoined because, among other things, it impersibbily discriminates against Mesa and its transferees by precluding them from participating in the offer. On April 29, 1985, following briefing and argument, a temporary restraining order was issued. Mesa Petroleum Co., et al. v. Unocal Corporation, et al., Del. Ch., C.A. No. 7997, Berger, V.C. (April 29, 1985). For the reasons set forth herein and based upon the more expanded record and arguments presently before the Court, Mesa's motion for a preliminary injunction is granted.

The record now includes transcripts and excerpts from more than a dozen depositions of the parties and investment bankers, more than twenty affidavit, approximately 250 pages of briefing and extansive appendices. Given this volume of material, only a summary of the most relevant facts is possible. Unocal is a Delaware corporation engaged principally in petroleum, chemical, geothermal and metal operations. It has approximately 174 million shares of common stock outstanding which are traded on the New York and other stock exchanges and are held by over 70,000 record shareholders. During the year and a half prior to the events described hereafter, Unocal stock traded between $29.87 and $43.75 per share.

On April 8, 1985, after having acquired approximately 13.6% of the common stock of Unocal, Mesa commenced a tender offer for 64 million shares of Unocal at $54 per share. Upon successful completion of the tender offer, originally set to expire on May 3, 1985, Mesa will own slightly over 50% of Unocal's outstanding common stock. The original offering circular discloses that Mesa's intent, following the tender offer, is to propose a second step transaction whereby the remaining publicly held shares will be exchanged for securities valued at $54 per share. Pursuant to an order entered by the United States District Court for the Central District of California on April 26, 1985 in related litigation, Mesa was required to file supplemental disclosures in connection with its tender offer and to extend the withdrawal date for its tender offer three weeks beyond the date of the corrective disclosures. As a result, Mesa's tender offer is now set to expire on May 23, 1985.

On April 13, 1985, Unocal's board of directors met to consider the Mesa tender offer. That meeting, which lasted more than nine hours, was attended by all of Unocal's directors except Donn Tatum, who was out of the country on business. The directors were given no agenda or written materials prior to the meeting. Early in the meeting Unocal's outside counsel explained the directors' fiduciary duties in responding to the Mesa tender offer and, in general, the requirements of the federal securities laws. Peter G. Sachs ("Sachs"), a general partner of Goldman, Sachs & Co. ("Goldman Sachs"), then made a presentation on behalf of Goldman Sachs and Dillon, Read & Co. ("Dillon Read") addressing the bases for their opinions that the Mesa tender offer price is inadequate. In addition, he discussed several responsive strategies available to Unocal, including a self tender.

During the course of his presentation, Sachs showed a series of slides outlining the financial advisors' valuation methodology and recent major business combinations in the oil and gas industry. Sachs testified that he did not advise the board of the financial advisors' Conclusions as to the values or ranges of values for the various components of Unocal. He did opine that if Unocal were offered for sale and interest were solicited from a number of buyers or if the company were liquidated in a careful and orderly manner, the values that could be realized would be in excess of $60 per share. From the slides and the deposition testimony of Sachs and several of the directors, it appears that the Sachs presentation was designed to apprise the directors of the scope of the analysis performed rather than the facts and numbers used in reaching the Conclusion that Mesa's tender offer price is inadequate.

Sachs then discussed possible responses to the Mesa tender offer, including a self tender. Unocal's financial advisors recommended a self tender in exchange for senior debt securities in the principal amount of between $70 and $75 per share. Inasmuch as the purpose of the Unocal offer would be to discourage Mesa's tender offer and to provide an "appropriate value" for those shares remaining after the completion of the Mesa tender offer, the board was advised that the Unocal offer, as contemplated, would be conditioned upon Mesa purchasing 64 million shares (the "Mesa purchase condition") and would not be available to Mesa.

In considering the proposed Unocal offer, the board was advised that it would result in an additional debt of approximately $6.1 to $6.5 billion. Mr. Blamey ("Blamey"), Unocal's Vice President, Finance, made a presentation, with slides, of certain pro forma financial effects of the issuance of $7 billion of new debt. Among other things, the company's assets would have to be revalued to more than $3 billion over their book net worth and capital expenditures would have to be reduced by between $549 million and $970 million annually over the next six years. Blamey's analysis included consideration of a hypothetical drop in the price of oil of $2.00 or $4.00 per barrel. He concluded that, with the mentioned reductions in capital expenditures and the elimination of dividends on common stock, Unocal would have sufficient cash flow to service the new debt and retire it in 1992. Sachs concurred.

There was also Discussion of the price at which such a self tender might be made. Sachs advised the board that in an orderly sale or liquidation the value of Unocal could reasonably be expected to be as high as $70 to $75 per share. It appears that this view, like the earlier statement about the value exceeding $60 per share, was not explained by reference to specific underlying asset values or underlying assumptions. For example, several directors did not recall there being any Discussion of how long it would take to liquidate Unocal and it appears that there were no questions raised as to whether a company of comparable size to Unocal had ever been liquidated.

After Unocal's eight outside directors met separately with the company's financial advisors and counsel, they unanimously agreed to advise the board that it should reject Mesa's tender offer as grossly inadequate. A resolution to that effect was adopted by the board and, although there was a general sense that Unocal should proceed with the proposed self tender, the board recessed without giving the proposal final consideration on the advice of counsel that the plan was not sufficiently well developed for the board to take action at that time.

The meeting was reconvened on April 15, 1985 with four of the board members present by telephone. At this two hour meeting slides were again used to supplement the oral presentations. Blamey and Unocal's assistant general counsel explained the proposed terms of the self tender offer. The directors were advised that there would be three different debt instruments, that the average interest rate would be 13.03%, that the notes would be secured by a pledge of all the common stock of Union Oil Company and that they would be issued pursuant to an indenture which would impose significant restrictions on future payment of dividends, future debt being incurred and other corporate actions. Although the restrictive covenants were described generally, the directors were neither given copies of the proposed covenants nor a run down of their terms.

At the proposed aggregate par value of $72 per share for the debt securities, the company would be incurring additional debt of $6.264 billion. Blamey explained that since he had previously demonstrated that the company had sufficient surplus to make a $7 billion borrowing, it was clear that the present proposal would leave the company with a substantial surplus. According to the minutes of the meeting, Blamey commented that there is "no question that the Company can get through 1985" and that the reduction in capital expenditures "would not have an immediate severe effect on revenues."

After further Discussions, the board approved resolutions authorizing an offer to exchange up to 87.2 million shares of Unocal's common stock for debt securities having an aggregate par value of $72 per share. The resolution provided that the offer shall contain the Mesa purchase condition and be subject to other conditions described to the board or deemed necessary by Unocal's officers, including the exclusion of Mesa. The resolution authorized Unocal's officers to execute an indenture in connection with the issuance of the debt securities which could include such covenants restricting future actions of the company as the officers deem necessary or appropriate.

Unocal commenced its exchange offer on April 17, 1985. On April 22, 1985, the Unocal board met to consider amending the exchange offer to waive the Mesa purchase condition with respect to 50 million shares. The board was advised that this partial waiver was strongly recommended by Unocal's investment advisors in order to encourage shareholders to tender to Unocal and to overcome their concern that, under the original offer, if shares were tendered to Unocal the result could be that no shares would be purchased either by Unocal or Mesa. After Discussion and consideration of pro forma financial information, the board unanimously adopted a resolution amending the exchange offer as recommended.

Also during that meeting, apparently as a result of Mesa's claim in this Court that its exclusion from the exchange offer is unlawful, the board discussed with outside counsel the law applicable to and the purpose of the exclusion. The directors discussed the fact that if Mesa were permitted to tender it would be reducing the number of shares that could be accepted from other Unocal shareholders. Moreover, Mesa, in effect, would be financing its inadequate tender offer with the proceeds of Unocal's exchange offer.

Unocal issued a Supplement to its exchange offer on April 24, 1985 describing the partial waiver of the Mesa purchase condition. On May 1, 1985, in a further Supplement, Unocal extended the withdrawal, proration and expiration dates of its exchange offer until May 17, 1985.

In the decision on Mesa's application for a temporary restraining order, this Court recognized the principle that directors may oppose and attempt to defeat a takeover bid which they have determined is not in the best interests of the company and its shareholders. However, where the defensive technique chosen is a selective purchase of the company's stock, the burden is on the directors to establish that the transaction is fair to all of its shareholders, including those excluded.

On May 2, 1985, Unocal attempted to appeal from this Court's interlocutory order. In an Order signed by Justice Moore on the same day, the Supreme Court deferred action on Unocal's application for certification until after the decision on Mesa's motion for a preliminary injunction. In its Order, the Supreme Court suggested that the parties address and the Court consider four issues:

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.

The parties basically agree that the directors' duty of care extends to protecting the corporation from perceived harm whether it be from third parties or shareholders. See e.g. Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir. 1981); Crouse-Hinds Company v. Internorth, Inc., 634 F.2d 690 (2d Cir. 1980); Kors v. Carey, Del. Ch., 158 A.2d 136 (1960); Cheff v. Mathes, Del. Supr., 199 A.2d 548 (1964).

The second question is factual and was not addressed in connection with the application for a temporary restraining order. There is no doubt that Pickens is well known in the business and financial world. He was featured on the cover of the March 4, 1985 issue of Time magazine and prominently mentioned in no fewer than ten articles in leading business and financial magazines this year alone. Mesa's recent takeover bids also have been prominently featured in the newspapers. This "public record" confirms that Mesa has made tremendous profits from its takeover activities although in the past few years it has not been successful in acquiring any of the target companies on an unfriendly basis.

For example, in its recent quest for Phillips Petroleum Company ("Phillips"), Mesa made a profit of almost $89 million after an agreement was reached whereby the Phillips shareholders would be allowed to vote on a recapitalization plan which would yield approximately $53 per share. Mesa was to receive $53 per share in cash as well as reimbursement for its actual expenses not to exceed $25 million. In the summary of 1982, after a tender offer for Mesa was made by Cities Service Company ("Cities"), Mesa responded with a tender offer for Cities. Before the respective offers expired, Cities entered into a merger agreement with Gulf Oil Company at $63 per share and Mesa and Cities both dropped their tender offers for each other with Cities buying back its shares from Mesa at $55 per share. Mesa made a profit of approximately $40 million. In September, 1983 after it had acquired three percent of the stock of Superior Oil Co. and amid rumors of a takeover or a proxy fight, Mesa sold its shares to Superior at $42 per share -- a 10% premium over market -- for a profit of approximately $32 million.

Pickens firmly maintains that he is not a "green-mailer" although he has been so labeled in the media.On several occasions Mesa has been paid either a premium or substantial expenses in connection with agreements reached with the target company. Although the facts, as outlined above, do not appear to be sufficient to prove that Mesa's principal objective is to be bought off at a substantial premium, they do justify a reasonable inference to the same effect.

The third and fourth questions posed by the Supreme Court indirectly appear to raise the more fundamental issue of whether directors owe fiduciary duties to shareholders who they perceive to be acting contrary to the best interests of the corporation as a whole. Justice Moore's Order indicates that the validity of Unocal's exchange offer as a defensive technique is a question of first impression in Delaware. In so doing, the Supreme Court appears to be recognizing that the line of authorities permitting other defensive maneuvers under the business judgment rule did not involve corporate action where the raider was treated unfairly vis a vis the other shareholders.

Numerous defensive techniques have been reviewed by the courts over the past several years. See e.g. GM Sub Corp v. Liggett Group, Inc., Del. Ch., C.A. No. 6155, Brown, V.C. (April 25, 1980) (sale of the company's "crown jewel" to a third party at a fair price); Pogo Producing Co. v. Northwest Industries, Inc., No. H-83-2667 (S.D. Tex. May 24, 1983) (non-discriminatory self-tender); Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir. 1981) (acquisitions made to create antitrust problems for the raider); Treadway Cos. Inc. v. Care Corp., 638 F.2d 357 (2d Cir. 1980) (issuance of a block of stock to prospective "white knight" merger partner); Carter Hawley Hale Stores, Inc. v. The Limited, Inc., C.A. No. 84-220-AWT (C.D. Cal. April 17, 1984) (market purchases of common stock and issuance of new preferred). All of these corporate actions, if taken outside the context of a takeover attempt, would be protected by the business judgment rule. The defensive maneuvers, in and of themselves, did not involve self-dealing, overreaching, fraud or the like. Since the business judgment rule is equally applicable in a takeover context, Pogostin v. Rice, Del. Supr., 480 A.2d 619, 627 (1984), attacks on these defensive maneuvers generally focused on the directors' motivation rather than the transaction itself. The standard applied was whether the actions were taken for the sole or primary purpose of entrenchment. Schnell v. Chris-Craft Industries, Inc., Del. Supr., 285 A.2d 437 (1971); Petty v. Penntech Papers, Inc., Del. Ch., 347 A.2d 140 (1975).

In this case, however, there is a real question as to the applicability of the business judgment rule. The parties agree that the business judgment rule governs Unocal's decision to oppose Mesa's tender offer and, although Mesa will not agree with this Conclusion, on this record I am satisfied that the directors' decision was made in the good faith belief that the Mesa tender offer is inadequate.

The issue is the level of scrutiny to be given to the selective exchange offer chosen by Unocal as its defense. Mesa argues that Unocal has the burden of establishing the entire fairness of the exchange offer for either of two reasons. First, since directors are fiduciaries for all the shareholders, they must be able to justify less than equal treatment of the shareholders. Second, since the directors will be benefiting from the exchange offer and not all of Unocal's shareholders will be permitted to share in that benefit, their interest in the exchange offer removes their decision from the protection of the business judgment rule.

Unocal argues that it has no duty to treat a raider fairly as long as it has made a good faith decision that the takeover would not be in Unocal's best interest. In essence, Unocal says that once Mesa has been identified as a threat, Unocal is free to eliminate Mesa from the class of all Unocal shareholders at least for purposes of defending against the takeover. If Mesa is viewed in this light, both of its arguments fail. The exchange offer is available to all shareholders (except the raider "non-shareholder") and the directors are receiving no benefit not shared generally by all shareholders (with the same exception).

In support of this analysis, Unocal combines the line of authorities, some of which are cited above, holding that the business judgment rule applies to defensive maneuvers with the cases holding that a selective repurchase of the dissident's stock is a valid means of eliminating the perceived harm from a threatened takeover. See Cheff v. Mathes, (supra) ; Kors v. Carey, Del. Ch., 158 A.2d 136 (1960); Kaplan v. Goldsamt, Del. Ch., 380 A.2d 556 (1977). Unocal notes that in the Cheff line of cases, the defendants were only required to establish that their decision was motivated by a good faith belief that the dissident represented a threat to the overall well-being of the corporation.From this they conclude that there is no obligation to establish that a selective repurchase is fair to the dissident.However, that was not an issue in any of the repurchase cases cited by Unocal. The dissident was being paid for his stock at a price he presumably found to be acceptable.

Thus, Unocal's position requires this Court to read into these cases, none of which dealt with the issue, a rule suspending the directors' fiduciary duty to treat shareholders fairly as to any shareholder perceived to be a threat to the company. The decisions of our courts consistently have not only recognized but have been founded upon the precept that directors "stand in a fiduciary relation to the corporation and its stockholders." Guth v. Loft, Inc., Del. Supr., 5 A.2d 503, 510 (1939); Pogostin v. Rice, (supra) at 624. Although shareholders may, at times, be treated differently consistent with the directors' fiduciary duties, Kors v. Carey, (supra) at 141, there appear to be no cases approving an abdication of those duties. To the contrary, in Martin v. American Potash & Chemical Corp., Del. Supr., 92 A.2d 295, 302 (1952), quoted with approval in Kors, the Supreme Court held that a private purchase of stock to eliminate the holdings of a dissident is not unlawful, "provided of course that the transaction is clear of any fraud or unfairness."

Any suspension of fiduciary duties as to a raider is all the more suspect because, under the standards governing defensive maneuvers, the target's directors need not establish that the raider would harm the company, they only must show a good faith belief. Mesa has a $1 billion investment in Unocal and is its largest shareholder. Good faith beliefs are not sufficient justification to discriminate against such a shareholder.

Based upon the foregoing, I conclude that the exchange offers' exclusion of Mesa cannot be justified as a defensive maneuver without departing from the established principles of fiduciary duty governing directors' treatment of their shareholders. Under Fisher v. Moltz, Del. Ch., C.A. No. 6068, Hartnett, V.C. (December 28, 1979), reprinted in 5 Del. J. Corp. L. 530 (1980), the business judgment rule does not apply to selective tender offers. Moreover, even if Fisher were not followed, the business judgment rule would not apply under the facts of this case because the directors stand to derive a personal benefit from their participation in the exchange offer which will not be shared by all shareholders generally. Aronson v. Lewis, Del. Supr., 473 A.2d 805, 812 (1984). The record establishes that the debt securities with trade at least at par ($72) and the market price for Unocal common stock was $49 per share at the time the exchange offer was commenced. As a result, the directors and other shareholders who tender to Unocal will receive $23 per share over market and regardless of whether $72 per share is the true value of Unocal, those who are excluded will not be able to realize that value. Unocal has made no effort to establish the fairness of the exchange offer as it applies to Mesa. Thus, I conclude that Mesa has established a probability of success on the merits as to this claim.

The record, however, does not provide sufficient support for Mesa's remaining claims for injunctive relief. Mesa argues that (1) the Unocal directors breached their fiduciary duty of due care by failing to make themselves adequately informed before acting on the exchange offer; (2) the exchange offer constitutes tortious interference with prospective business advantage; (3) it impermissibly interferes with Mesa's proxy solicitation; and (4) the directors breached their fiduciary duty of complete candor in the disclosures made in the offering circular.

Mesa relies principally on the recent decision in Smith v. Van Gorkom, Del. Supr., 488 A.2d 858 (1985) in support of its claims that Unocal's directors failed to exercise due care in considering the exchange offer. There are some similarities to the Van Gorkom facts, most notably the lack of documentation provided to the Unocal board before, during and between its meetings. However, in contrast to the facts in Van Gorkom, the Unocal board met for more than nine hours on April 13 and two hours on April 15, received lengthy presentations from independent financial advisors, counsel and management and discussed the matters under consideration. Although further evidence, especially with respect to the directors' consideration of the indenture restrictive covenants, may lead to a different result, at present I find that Mesa has not demonstrated a likelihood of success on the merits on the issue of due care.

The tortious interference claim, as Mesa acknowledges, can be defeated based upon Unocal's privilege to compete or protect its business interest in a fair and lawful manner. See DeBonaventura v. Nationwide Mutual Insurance Co., Del. Supr., 428 A.2d 1151, 1153 (1981). As noted earlier, the record supports Unocal's position that the exchange offer was designed as a defensive maneuver to protect the company from the perceived threat posed by Mesa. Although I have found that Mesa is likely to succeed on the merits as to the Mesa exclusion from the exchange offer, it is not clear that conduct which is impermissible in the context of intra-corporate activity is also impermissible for purposes of raising a privilege defense to the claimed tortious interference.

The proxy solicitation claim, likewise, has insufficient record support to justify injunctive relief. The evidence does not establish that the exchange offer is having a direct impact on Mesa's proxy solicitation in favor of adjournment of the Unocal Annual Meeting. Cf. Mesa Petroleum Co. v. Unocal Corp., Del. Ch., C.A. No. 7997, Berger, V.C. (April 22, 1985).

Mesa's disclosure claims also fail to justify injunctive relief. Inasmuch as I found there is insufficient evidence to support a preliminary Conclusion that the directors acted on the exchange offer without adequate information, it follows that Mesa's disclosure claim based upon the same theory cannot be sustained. Nor is Unocal required to disclose legal Conclusions such as the advice given to the Unocal board that the Mesa exclusion is without close precedent and would involve some risks. Fisher v. United Technologies Corp., et al., Del. Ch., C.A. No. 5847, Harnett, V.C. (May 12, 1981).

Mesa also argues that Unocal failed to disclose the effect the withdrawal of the Mesa tender offer may have on the market value of Unocal's stock. The offering circular does indicate the market price of Unocal stock immediately before Mesa began acquiring Unocal stock, immediately prior to the commencement of its tender offer and as late as April 15, 1985. To the extent that Mesa's belief that the market price of Unocal stock would drop to the middle $30 range if the Mesa tender offer were withdrawn, that Conclusion may be derived by a review of the chart disclosing Unocal's trading prices and keying that information to the dates of relevant events.

The remaining disclosure claims fall in the same category. Although Mesa contends that the offering circular misrepresents the extent of the fairness opinions provided by Unocal's investment advisors, the full text of those opinions are attached to the offering circular, thereby "allowing the stockholder to draw his own Conclusions as to their credibility." Fisher v. United Technologies Corp., et al., (supra) , Slip Op. at 9. Finally, Mesa complains that the offering circular fails to adequately advise the shareholders that, as originally designed, the decision to tender to Unocal instead of Mesa could result in both offers being withdrawn. This possibility is set forth on the cover page of the offering circular and again on page 40 under the section titled, "Certain Conditions to the Company Offer." Although these disclosures may not be as clear and prominent as Mesa would prefer, I am not satisfied that the disclosures made were inadequate.

The remaining issues are whether Mesa has made a showing of irreparable harm and whether the balance of hardship tips in its favor. In apparent recognition of the realities of an exchange offer such as this one involving more than 70,000 shareholders, Unocal does not quarrel with this Court's earlier Conclusion that rescission will not be a viable remedy. However, relying principally on Judge Tashima's contrary Conclusion in the related California Federal Court action, Unocal argues that the exchange offer's admitted purpose to block the Mesa takeover is not sufficient to establish irreparable harm. Unocal correctly points out that Mesa is not entitled to have Unocal's assets frozen just because it is attempting to gain control of the company. See GM Sub Corporation v. Liggett Group, Inc., (supra) . However, it does not follow from that proposition that injunctive relief will not lie to prevent an unlawful alteration of the company's assets which was also designed to fend off a Mesa takeover.

I conclude, as I did earlier, that Mesa has adequately established the threat of irreparable injury. The purpose of the exchange offer is to defeat Mesa's takeover bid and the record evidence supports a Conclusion that the substantial debt to be incurred as a result of the exchange offer together with the restrictive covenants in the indenture will make it more difficult for Mesa to succeed in its takeover efforts. While recognizing that injunctive relief is an extraordinary remedy not to be lightly granted, I am not persuaded that Mesa must establish that it will be crippled by Unocal's unlawful conduct in order to establish irreparable harm.

Unocal has presented no argument in opposition to the Court's earlier finding that the balance of hardships tips in favor of Mesa and, after further consideration, the Court remains satisfied with its initial Conclusion which was based upon the fact that it is entirely within Unocal's control whether it will continue the exchange offer without the Mesa exclusion.