2. Injunction ⟸ 136(1)

A court reviewing a request for preliminary injunctive relief must consider the offsetting equities, if any, including the interests of the public and other third parties.

3. Corporations ⟸ 307, 310(1)

A director owes a duty of loyalty to the corporation and to the shareholders.

4. Corporations ⟸ 307, 310(1)

Directors owe a duty to shareholders as a class to manage the corporation within the law, with due care, and in a way intended to maximize the long-run interests of shareholders.

5. Corporations ⟸ 310(1)

When the breakup of a company is inevitable, the duty of the board changes from the preservation of the company as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit.

6. Corporations ⟸ 182.4(1), 182.4(2)

The fact that 40% and 50% premiums over current stock prices can be realized in management leveraged buyouts or in management restructurings renders the response of market theorists, that assets under new management are worth more, unpersuasive.

7. Corporations ⟸ 182.1(1), 310(1)

The rationale for recognizing that non-contractual claims of other corporate constituencies are cognizable by boards, or the rationale that recognizes the appropriateness of sacrificing achievable share value today in the hope of greater long-term value, is not present when all of the current shareholders will be removed from the field by the contemplated transaction.

8. Corporations ⟸ 310(1)

The so-called Revlon duty is not necessarily a duty to conduct an auction or to keep a level playing field when the firm is for sale or, indeed, to proceed in any prescribed way; rather it is the duty to exercise judgment in good faith and prudently in an effort to maximize immediate share value.

9. Corporations ⟸ 310(1)

When a corporation is in a "Revlon mode," legitimate concerns relating to the claims of other constituencies are absent and, indeed, concerns about the corporation as a distinct entity become attenuated.

10. Corporations ⟸ 310(1)

When a corporation is in a "Revlon mode," the directors' role changes from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company.

11. Corporations ⟸ 174, 307, 310(1)

While corporate democracy is a pertinent concept, a corporation is not a New England town meeting; directors, not shareholders, have responsibilities to manage the business and affairs of the corporations, subject however to a fiduciary obligation.

12. Corporations ⟸ 310(1)

In the few instances where a court order was issued requiring a board of directors to redeem a defensive stock rights plan, the board itself had elected to pursue either an outright sale of the company and had completed an auction process or had elected to pursue a defensive restructuring that, in form and effort, was a close approximation of, and an alternative to, a pending all cash tender offer for all shares.

13. Corporations ⟸ 182.4(1)

A public tender offer can be a change in control transaction that is functionally similar to a merger transaction with respect to the critical question of control over the corporate enterprise.

14. Corporations ⟸ 310(1)

The recent amendment to section 203 of the Delaware General Corporate Law does confer an indirect role in granting power to the board to grant certain dispensations from the general proscription of "business combinations" involving an "interested stockholder." DEL. CODE ANN. tit. 8, § 203 (1988).

15. Corporations ⟸ 310(1)

A decision not to redeem a pill in the face of a hostile tender offer is a defensive step that has to be reasonable in relation to the threat posed by such offer.

16. Corporations ⟸ 310(1)

The exercise of a board's power under Delaware General Corporate Law section 251, where there is no interested merger involved, is subject to a traditional business judgment rule, not the proportionality review of *Unocal*. DEL. CODE ANN. tit. 8, § 251 (1987).

R. Franklin Balotti, Esquire, Gregory P. Williams, Esquire, and Joseph J. Bodner, Esquire, of Richards, Layton & Finger, Wilmington, Delaware; and John L. Warden, Esquire, Norman Feit, Esquire, John L. Hardiman, Esquire, and Benjamin F. Stapleton, III, Esquire, of Sullivan & Cromwell, New York, New York, for TW Services, Inc., Lester Crown, W.L. Hadley Griffin, Robert A. Kozlowski, Howard M. Love, John P. Mascotte, Jerome J. Richardson, Frank L. Salizzoni, L. Edwin Smart, Patricia Carry Stewart, and Jack Valenti.

Norman M. Monhait, Esquire, of Morris, Rosenthal, Monhait & Gross, P.A., Wilmington, Delaware, and Robert P. Sugarman, Esquire, and Lee S. Shalov, Esquire, of Milberg, Weiss, Bershad,

Specthrie & Lerach, New York, New York, and Stuart H. Savett, Esquire, of Kohn, Savett, Klein & Graf, Philadelphia, Pennsylvania, for class plaintiffs in No. 10,298.

Bruce M. Stargatt, Esquire, David C. McBride, Esquire, Josy W. Ingersoll, Esquire, and Bruce L. Silverstein, Esquire, of Young, Conaway, Stargatt & Taylor, Wilmington, Delaware; and Edmund H. Kerr, Esquire, Richard F. Ziegler, Esquire, Lawrence B. Friedman, Esquire, Andrew Weissmann, Esquire, Howard S. Zelbo, Esquire, Philipp H. Windemuth, Esquire, and Joshua H. Rawson, Esquire, of Cleary, Gottlieb, Steen & Hamilton, New York, New York, for SWT Acquisition Corporation and SWT Associates, L.P.

ALLEN, *Chancellor*

Pending is a motion by SWT Acquisition Corporation ("SWT") seeking a preliminary mandatory injunction requiring TW Services, Inc. ("TW") to redeem certain stock rights, authorized by the TW board of directors without action by shareholders, on September 19, 1988.[1] It is asserted that the refusal of TW's board to redeem these rights precludes SWT from buying TW stock tendered to it pursuant to a public tender offer commenced on October 28, 1988. That offer, as amended, is for all shares and offers $29 per share cash. SWT, or entities affiliated with it, owned at the time it commenced its offer 19.09% of TW's outstanding stock. It reports that sufficient shares have been tendered to it so that, should it now close its offer, it would own approximately 88% of TW's common stock (85.7% on a fully diluted basis).

SWT asserts that it has already invested some $200 million in TW stock, that it stands ready to invest more and that it has paid for commitments from Citibank and from Donaldson, Lufkin & Jenrette to provide the remaining funds to close the transaction. It claims to be willing to do so promptly (after a possible 48 hour delay) upon the redemption of TW's "poison pill." All that stands in the way of completing this transaction, it is claimed, is the chilling effect of the punitive dilution that the defensive stock rights threaten.

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1. Movants are defendants in this declaratory judgment action. They are joined in this application by plaintiffs in certain consolidated class actions purportedly brought on behalf of stockholders of TW Services, Inc. In general, the stockholder plaintiffs assert the same positions on this motion as does SWT.

The fact that the TW board has not redeemed the Company's poison pill in the face of this all cash, all shares offer that a preponderant proportion of TW shareholders wish to accept is said to constitute a breach of duty. This action cannot, it is said, be reasonable in relationship to a threat to shareholders or to the Company posed by this offer.

The board does not attempt to defend its action as an attempt to maximize current share values. Rather, the directors say that they have looked at the overall situation and have concluded that the circumstances surrounding the SWT offer—including the history of SWT's principals, the course of the offer and the condition in it—indicate that the offer is not a *bona fide* offer to purchase all TW shares but is either a ruse designed to put TW "in play" so that a quick profit might be made by SWT on its recently acquired TW position, or is designed to provide a setting in which "greenmail" might be paid. With that view of the matter—which the directors claim is taken in utter good faith and not as a pretext to enable themselves to remain in office—the directors have concluded that they are under no duty to even address the question whether it is appropriate to redeem the pill or to take other action to maximize short term shareholder values.

For the reasons that follow—having importantly to do with the particularities of this offer—I conclude that the proportionality test of *Unocal Corp. v. Mesa Petroleum Co.*, Del. Supr., 493 A.2d 946 (1985) does not, in this instance, apply to the TW board's decision not to divert this Company from its long term business plan in order to facilitate or propose an extraordinary transaction designed to maximize current share value. Having also concluded for the purpose of this motion that the board appears to be acting in the good faith pursuit of legitimate corporate interests in so deciding and with due care, I am unable to ascertain a basis to grant the remedy now sought. This narrow decision leaves open the more fundamental question arguably raised by these facts. I have found it necessary to frame but not address that issue in reasoning to the result here reached and set forth below.

I.

TW Services, Inc. is a Delaware corporation whose principal offices are located in New York City. The Company essentially represents the non-airline and non-hotel businesses of the old Transworld Corporation. Through subsidiaries (Canteen Corporation,

Spartan Food Systems, Inc. and American Medical Services), TW operates restaurant and food facilities and provides retirement and nursing home care. Its restaurant businesses include Denny's, acquired in 1987, as well as Hardees, Quincy's Family Steak House and El Pollo Loco Restaurants. Through its WDH subsidiary, the Company owns a 42% stake in Winchell's Donut Houses, L.P.

The Company has 50,034,640 shares outstanding on a fully diluted basis. The price of its stock has ranged from a high of $22 5/8 in the third quarter of 1987 to a low of $13 3/4 in the first quarter of 1988. TW shares were trading at approximately $19 prior to the sale to Coniston Partners (an SWT affiliate) of a 14.9% block of TW stock by Ronald Perelman in September, 1988. The current $29 offer was announced on October 28, 1988.

SWT Acquisition Corporation is a Delaware corporation formed for the sole purpose of acquiring TW's shares. It is an affiliate of Coniston Partners ("Coniston"), and other related investment funds. SWT is a wholly-owned subsidiary of SWT Associates L.P., a Delaware limited partnership of which Coniston Partners owns 43%. Its general partner is another Coniston affiliate.

The TW Board Adopts a Rights Plan

At its regular meeting held July 27, 1988, the TW board considered but did not act upon the question whether TW should adopt a stock rights plan.

On September 13, 1988, SWT acquired the 14.9% Perelman block of TW stock and made open market purchases of another 332,400 shares. In the following week, it made additional purchases which, when combined with its initial purchase of 1% in early 1987, brought SWT's holdings in the Company to a total of 9,267,400 shares or 19.09% of the outstanding stock. The average cost of SWT's purchases was $19.71 per share.

Noting the unusual activity in TW's stock, the TW board met by telephone on September 19, 1988 in a special meeting and unanimously adopted the Rights Plan[2] it had discussed at its July board meeting.

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2. The Rights Plan includes a flip-in feature which provides that in the event that any person or group acquires 20% or more of TW's outstanding common stock, each Right, with the exception of those held by the Acquiring Person, may be exercised to purchase additional TW common stock at half price. The Rights

During the telephonic meeting, the board was informed by its outside legal counsel that the Rights Plan was an important negotiating tool in the event of a takeover, but that the Rights Plan would not, indeed was not intended to, prevent a fully financed tender offer for all of the Company's shares at a fair price.[3]

Following the board's adoption of the Rights Plan, a letter was sent to stockholders on September 29, informing them that:

> [Your] Board of Directors has acted to protect your investment in TW Services, Inc. by adopting a Stockholder Rights Plan. The Plan is designed to preserve long-term values and safeguard your interests against stock accumulations, inadequate tender offers and other abusive takeover tactics that are currently prevalent and that the Board believes are not in the best interest of stockholders.

The letter went on to say that:

> [T]he Rights contain provisions to protect stockholders in the event of an unsolicited attempt to acquire the Company. The Rights are not intended to prevent a fair and equitable tender offer or other acquisition proposal for the Company's shares and will not do so. However, they should encourage anyone seeking to acquire the Company to negotiate with the Board and to pay a full and fair price. Because the Rights may be redeemed by the Board, as described below,

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held by the Acquiring Person are cancelled.

The flip-in provision will not apply in the event that the bidder crosses the 20% threshold pursuant to a transaction that is "at a price and on terms" which the board with the advice of its financial advisors determines to be "(a) at a fair price and (b) otherwise in the best interests of the Company and its shareholders."

The flip-over provision would allow TW shareholders to purchase shares of the Acquiring Person at half price in the event that TW engages in a merger, consolidation or sale of 50% or more of its assets or earning power.

The Rights were "distributed" as a dividend to all TW common shares on September 29, 1988. They are currently represented by the underlying common shares, and no separate Rights Certificates have been distributed. Following distribution, each Right will initially entitle its holder to purchase one-hundredth of a share of TW Series A Preferred Stock for a price of $75 per unit subject to adjustment.

3. Outside legal counsel provided the board with a September 16, 1988 memorandum which stated under the heading "What a Rights Plan Can Do" that the plan will serve the purpose of "encouraging a bidder to negotiate with the Board of Directors in order that the Board might aid stockholders in maximizing the value of their investment." SWT Exh. 5 at 2.

> they should not interfere with any proposal which your Board of Directors determines is in the best interests of stockholders.

Apart from one unfruitful meeting on September 27, no negotiations have taken place between SWT and the TW board.

The Public Announcement of SWT's Intentions

On September 23, 1988, SWT filed a Schedule 13D with the Securities Exchange Commission, disclosing its ownership of 19.09% of the stock and its intention to ". . . seek to meet with management of the company to discuss the possible acquisition of the company by SWT or [another affiliate of Coniston's principals]. Depending on the outcome of discussions with company management, SWT or another affiliate . . . may consider making an offer for the company directly to its Board or to its stockholders."

The 13D filing also noted that SWT was aware that under 8 *Del. C.* § 203, its position as a 19.09% shareholder might trigger the provisions of that statute, which prohibit a holder of 15% of a company's stock from engaging in certain defined "business combination" transactions, unless it obtains the consent of the board and the approval of 66 2/3% of the noninterested stock.

Following SWT's announcement, Mr. Tierney, a Coniston principal, arranged a September 27 meeting with Mr. Salizzoni, the CEO of TW. A proposal was made for a leveraged acquisition of the Company, in which management was to have a substantial role. The proposal was rejected.

SWT's Proposal to Acquire the Company for $28

On October 5, 1988, Coniston formally proposed that TW enter into a merger agreement with SWT pursuant to which SWT would acquire all of the stock of TW that it did not already own for $28 per share cash. The price offered represented approximately a 50% premium over the unaffected market price ($19); a 27% premium over the high price of the stock during the preceding year; and a 69% premium over the average price of TW stock during the first eight months of 1988.

The TW board met on October 12 to consider this proposal. After presentations from its financial advisers, Merrill Lynch Capital Markets and First Boston Corporation, the board concluded that the offer was inadequate. In reaching this determination, the board

considered the value of the Company under various scenarios, including a sale, a leveraged buyout, a recapitalization and various forms of breakup analysis.

SWT's Partial Tender Offer

On October 28, 1988, SWT commenced a partial tender offer for $15,750,000, or approximately 31.5%, of TW's shares, sufficient to bring SWT's holdings to 51%, at a price of $29 per share. The offer was subject to an Approval Condition:

> The Offer is conditioned upon, among other things, **** Purchaser being satisfied *that the board of directors* of the company *has approved the Offer* and recommended that the stockholders of the company accept the Offer and tender their Shares *and that the company has entered into a satisfactory merger agreement* with Purchaser or an affiliate of Purchaser.

Offer to Purchase, p. 1 (emphasis added).

It was further subject to a Financing Condition which predicated the consummation of the offer on the availability of sufficient funds to purchase the shares at the time of closing:

> The Offer is conditioned upon **** (3) Purchaser obtaining sufficient funds pursuant to the existing commitment and highly confident letters described herein to enable it to purchase the Shares being sought in the Offer and to consummate the proposed merger described herein and to pay related fees and expenses.

Offer to Purchase, p. 1.

This Condition, SWT asserts, is not dissimilar to financing conditions contained in many recent tender offers for public companies. *See, e.g.*, offers to purchase by the Campeau Corporation for Federated Department Stores, and the Prospect Group for Facet Enterprises. *See* Friedman Aff. Ex. C.

Concomitant with the commencement of its tender offer, SWT also brought suit in the District Court in Wilmington seeking to have 8 *Del. C.* § 203 declared unconstitutional.

The TW Board's Consideration of The October 28 Tender Offer

The board met on November 2 and on November 9 to consider SWT's offer. It determined that in view of the Financing Condition and its Approval Condition, the offer was not a *bona fide* offer but

was, in the language of a later TW board SEC filing, "at best, merely an invitation to the Board to enter into merger negotiations looking to the possible acquisition of the Company by the purchaser in a highly leveraged transaction." The board also heard presentations from its financial advisors to the effect that the $29 price of the offer was inadequate. It considered the two tier structure of the offer to be coercive and the leveraging of the Company contemplated by the offer to be detrimental to the operation and effectiveness of the Company. The board recommended that shareholders not tender their shares.

The Amended SWT Offer of $29 Cash for All Shares

On November 23, the District Court dismissed SWT's Section 203 lawsuit on grounds of ripeness. SWT then amended its tender offer on November 29, 1988 to make it an all cash offer for all shares. The new offer contained the same conditions as the prior offer, with the added condition that a sufficient number of shares be tendered to give SWT at least 80% of the outstanding shares.

The TW board met on December 7, 1988 to consider the amended offer. Its financial advisors reiterated their opinions as to the inadequacy of the $29 offering price. The board again chose not to consider redemption of the Rights Plan because it continued in the view that the offer was "merely an invitation to negotiate." The board once again declined that invitation.

The following day, the board addressed a letter to SWT, which stated in pertinent part:

> Your December 1 letter suggests that you "will consider waiving all conditions to [your] offer, including the Board approval condition," if the Board redeems the company's preferred stock purchase rights. We believe you have tried to put the cart before the horse. Until you have waived the other conditions to your "offer," particularly the Board approval and merger agreement conditions, the rights have no effect on your ability to purchase shares pursuant to your "offer" and the Board has no occasion to consider the question of redemption.
>
> You are, of course, the masters of your own "offer," and are free to waive the conditions to it at any time. Should you do so, and thereby make a firm offer for all shares, the Board will consider it, and, in that context, take up the question of redemption of the rights.

SWT Ex. 16.

In response to the board's letter, SWT sent the board a draft merger agreement. This provoked the board to respond with a letter dated December 14, this time stating its position more bluntly and with greater specificity. It stated that the board would not consider the offer to be "real," and therefore would not consider redeeming the Rights Plan, "until such time as all of its conditions, other than the Minimum Tender Condition, the Rights Condition and those conditions set forth in subparagraphs (a), (c), (e), (f), (g) and (h) of Section 15, have been satisfied, waived or eliminated."[4] Nothing further was heard from SWT until January 3.

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4. The conditions the board was willing to accept, in addition to the Minimum Tender Condition and the Rights Condition, appear below in summary form. They provide that SWT shall not be required to purchase the shares if any of the following takes place prior to purchase of the shares: (a) any government action by statute, rule or judgment which might, *inter alia*, render purchase of the shares illegal, result in a delay in the acceptance of the shares for payment, or render the purchaser unable to exercise its rights as the owner of the shares, including its voting rights and its ability to control the business and operations of the Company; (c) suspension in trading of the stock, declaration of a banking moratorium, commencement of a war involving the U.S., a fall in the dollar or other currency exchange upheaval, or a break in the stock market; (e) any material change in the condition of the company's equity or operations which is adverse and is not now known to purchaser; (f) changes in the equity structure of the Company such as distribution of securities, stock options, repurchase of outstanding shares or distribution of a dividend, announcement of an exchange offer, etc.; (g) the Company enters into any employment or severance agreement in connection or as a result of transactions contemplated by the offer, which is outside the normal course of business; or (h) the Company and purchaser or any of its affiliates reach an agreement or understanding that the offer be terminated or amended, or purchaser or any of its affiliates enter into a definitive agreement or announce an agreement in principle with the Company providing for a merger or business combination with the Company (subject to the terms of any such definitive agreement or agreement in principle).

The conditions the board would not accept, in addition to the Financing Condition and the Approval Condition, were denominated (b), (d) and (i). They made the offer void in the event of: (b) the threat or institution of any action or proceeding that might result in the consequences referred to in (a) above; (d) a tender offer by any other person for the Company or (i) the purchaser shall become aware of (i) the impairment of any contractual right of the Company or the acceleration of any of its debt as a result of the offer, or (ii) any covenant, term or condition of any of the Company's agreements which in the sole judgment of the purchaser may have an adverse effect on the business, properties, assets, liabilities, capitalization, stockholders' equity, condition (financial or otherwise), operations or prospects of the Company or any of its subsidiaries (including, but not limited to, any event of default that may ensue as a result of the consummation of the offer or the acquisition of control of the Company) or the value of the shares in the hands of parent, the purchaser or any other affiliate of parent.

The January 3 Amended Tender Offer

On January 3, 1989, SWT filed Amendment 15 to its Schedule 14D-1, which included a representation that if the board redeemed the Rights, either voluntarily or pursuant to a court order, then SWT would waive the Approval Condition as of the second business day following such redemption. The waiver would not occur if SWT and the Company had entered into merger negotiations prior to the close of the second business day. If such negotiations had not begun, then the waiver would become automatic with no further action by SWT. This waiver would cause SWT to incur an additional $3.6 million in financing costs if the tender offer is consummated, and $3.75 million in non-refundable fees if it is not. The board was promptly apprised of this action by letter. With respect to financing, SWT has notified the board that it has received commitments from Citibank and Donaldson, Lufkin & Jenrette for the financing necessary to consummate the offer.

Since the January 3, disclosure, the TW board has continued to adopt the stance that the offer is not "real" and that it has no obligation in these circumstances to consider whether to redeem the stock Rights or to engage in any alternative transaction. When asked at his deposition whether the tender of sufficient shares to take SWT to an 80% holding suggested strong support of the $29 tender offer, TW's chairman, Mr. Salizzoni, replied, "I think the stockholders like the $29 price." Salizzoni Dep. at p. 146.

II.

[1-2] The pending motion purports to seek a preliminary injunction. The test for the issuance of preliminary injunctive relief is well settled. The applicant must demonstrate both a reasonable probability of success on the merits and the threat of an injury that will occur before trial which cannot be remedied by an award of damages or the later shaping of equitable relief. The court must also consider the offsetting equities, if any, including the interests of the public and other third parties, as well as defendants. *See generally Ivanhoe Partners v. Newmont Mining*, Del. Supr., 535 A.2d 1334, 1341 (1987).

The relief now sought, the redemption of the stock Rights in the present transactional context, differs materially from the traditional grant of preliminary injunctive relief. If awarded now, such relief would constitute mandatory relief. *Steiner v. Simmons*, Del. Supr., 111 A.2d 574, 575 (1955). Moreover, if it is awarded, it would in effect constitute relief that could not later effectively be reversed

following trial. Since it would, in my opinion, constitute final relief, the relief now sought ought not be granted unless SWT satisfies the standards applicable to a grant of summary judgment. *See City Capital Associates v. Interco Incorporated*, Del. Ch., C.A. No. 10105, Allen, C. (November 1, 1988).

III.

As frequently occurs, the parties divide on the most fundamental question: what are the legal issues that the facts present?

According to SWT, the ultimate question on this motion is the one presented to this court recently in *Grand Metropolitan PLC v. The Pillsbury Company*, Del. Ch., C.A. No. 10319, Duffy, J. (December 16, 1988) and *City Capital Associates v. Interco Incorporated, supra*—that is, whether in failing or refusing to redeem the poison pill they recently put in place, the TW directors acted reasonably in relation to a threat that the SWT offer poses to the TW shareholders.

According to the directors of TW, however, the main issue presented on this motion is not that at all. It is, rather, whether or not the particular circumstances presented have now placed the board in a situation in which its duty to the corporation and its shareholders[5] requires it to deviate from a long term business plan and to adopt *some* plan for the current maximization of share value. They say that the particularities of the SWT proposal are such that, under long established case law, the board has no duty to abandon its long term management in order to pursue any immediate share value maximization plan. Thus, the directors contend that they have rightfully not considered whether to redeem the Rights or to engage in some other extraordinary share value maximizing transaction.

The necessary first step in any legal analysis—defining the issue—will require more attention here than is ordinarily the case. That question involves an inspection of the distinction that the TW directors assert: the difference between a director's fiduciary duty when managing the corporation for the long term and when managing in a context in which the immediate maximization of share value is

5. The knowledgeable reader will recognize that this particular phrase marks the most fundamental issue: to what interest does the board look in resolving conflicts between interests in the corporation that may be characterized as "shareholder long term interests" or "corporate entity interests" or "multi-constituency interests" on the one hand, and interests that may be characterized as "shareholder short term interests" or "current share value interests" on the other?

sought. This, of course, is not an academic inquiry here where a part of the board's justification for its position is that completion of the tender offer and a follow-up merger would result in subjecting the Company to a level of debt that would threaten the long term welfare of the corporate entity (or at least would be less than optimal).

A.

[3-4] I take it as non-controversial that, under established and conventional conceptions, directors owe duties of loyalty to the corporation and to the shareholders; that this conjunctive expression is not usually problematic because the interests of the shareholders as a class are seen as congruent with those of the corporation in the long run; that directors, in managing the business and affairs of the corporation, may find it prudent (and are authorized) to make decisions that are expected to promote corporate (and shareholder) long run interests, even if short run share value can be expected to be negatively affected,[6] and thus directors in pursuit of long run corporate (and shareholder) value may be sensitive to the claims of other "corporate constituencies." Thus, broadly, directors may be said to owe a duty to shareholders as a class to manage the corporation within the law, with due care and in a way intended to maximize the long run interests of shareholders.

[5] There is a time, however, when the board's duty becomes more targeted and specific and its range of options becomes narrower. In *Revlon v. MacAndrews & Forbes Holdings, Inc.*, Del. Supr., 506 A.2d 173, 182 (1986), the board of directors had decided in the exercise of its judgment to engage in a sale transaction that might terminate the interest of all of the existing holders of stock. In that circumstance, the Supreme Court held that the board's duty was the single one: to exercise its judgment in an effort to secure the highest price available:

> [When] the breakup of [a] company [is] inevitable . . . [t]he duty of the board . . . change[s] from the preservation of [the Company] as a corporate entity to the maximization

6. The list of such endeavors might touch upon every aspect of running the business: research and product development; personnel training and compensation; charitable and community financial support. *See Kelly and Wyndham, Inc. v. Bell*, Del. Ch., 254 A.2d 62 (1969), *aff'd*, Del. Supr., 266 A.2d 878; *Theodora Holding Corp. v. Henderson*, Del. Ch., 257 A.2d 398 (1969). The distinction between long term and short term share valuation is touched upon below at note 7.

> of the Company's value at a sale for the stockholders' benefit. *Revlon*, 506 A.2d at 182.

Ivanhoe Partners v. Newmont Mining, Del. Supr., 535 A.2d 1334, 1344 (1987).

[6-7] In the setting of a sale of a company for cash, the board's duty to shareholders is inconsistent with acts not designed to maximize present share value, acts which in other circumstances might be accounted for or justified by reference to the long run interest of shareholders.[7] In such a setting, for the present shareholders, there is no long run. For them it does not matter that a buyer who will pay more cash plans to subject the corporation to a risky level of debt, or that a buyer who offers less cash will be a more generous employer for whom labor peace is more likely. The rationale for recognizing that non-contractual claims of other corporate constituencies are cognizable by boards, or the rationale that recognizes the appropriateness of sacrificing achievable share value today in the hope of greater long term value, is not present when all of the current shareholders will be removed from the field by the contemplated transaction.

[8-10] Thus, in my opinion, the so-called Revlon duty is not necessarily a duty to conduct an "auction"[8] or to keep "a level

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7. That there is a real difference between action that will maximize immediate share value and action of the kind that most boards pursue to seek "long term" corporate or shareholder value can hardly be gainsaid in this era in which 40% or 50% premiums over current stock price are typically encountered in hostile takeover situations. There is no agreement, however, why such discounts over apparently underlying value exist. *See, e.g.*, Kraakman, *Taking Discounts Seriously; The Implications of "Discounted" Share Prices As An Acquisition Motive*, 88 Col. L. Rev. 891, 897-901 (1988); Coffee, *Shareholders Versus Managers: The Strain In The Corporate Web*, 85 Mich. L. Rev. 1 (1986). The fact that such gains can be realized in management leveraged buyouts or in management restructurings renders the first response of market theorists—that assets under new management are worth more—unpersuasive.

8. *See, e.g., City Capital Associates v. Interco Incorporated*, Del. Ch., C.A. No. 10105, Allen, C. (November 1, 1988), slip op. at 42-43; *In Re Fort Howard Corp. Shareholders Litigation*, Del. Ch., C.A. No. 9991, Allen, C. (August 8, 1988). Obviously, when a sale is contemplated, the duty to act in an informed way will ordinarily dictate that information about alternatives be collected and considered. The market is the only place where "hard information" on that subject will be found. But alternatives to an "auction" for collecting the information that directors need to make an informed choice may be appropriate, particularly in the setting of a sale to an arm's-length third party.

playing field" when the firm is for sale[9] or, indeed, to proceed in any prescribed way;[10] rather, it is the duty to exercise judgment (in good faith and prudently) in an effort to maximize immediate share value. When a corporation is in a "Revlon mode," legitimate concerns relating to the claims of other constituencies are absent and, indeed, concerns about the corporation as a distinct entity become attenuated:[11]

> The duty of the board had thus changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit. This significantly altered the board's responsibilities . . . . It no longer faced threats to corporate policy . . . . [D]efensive measures become moot. The directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company.

Revlon, 506 A.2d at 182. Thus, being in a "Revlon mode"—that situation in which Revlon duties arise—is for a director to be in a radically altered state.

A critical question, therefore, is *when* is a corporation in a Revlon mode? Surely as in *Revlon* itself, when the board decides to sell the company, the duty to seek to maximize current value arises. Most of the cases construing the Revlon duty arise in the context of a board decision to conduct a public sale of the corporate enterprise.[12]

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9. *See In Re J.P. Stevens & Co., Inc. Shareholders Litigation*, Del. Ch., 542 A.2d 770 (1988) (a topping fee that gave some competitive advantage to one bidder approved in the circumstances).

10. *See In Re RJR Nabisco, Inc. Shareholders Litigation*, Del. Ch., C.A. No. 10389, Allen, C. (January 31, 1989) (good faith judgment to conclude auction with financially equivalent bids upheld).

11. Even where the board has elected to pursue a sale for cash, however, several factors justify some board concern with long term corporate issues: first, the enterprise must be well maintained in order to attract the best price; second, a sale on acceptable terms might not be arranged; third, the best available sales transaction might entail a part of the sales price being paid in debt or equity in the corporation or the successor to its business. *E.g.*, *In Re RJR Nabisco, Inc. Shareholders Litigation*, Del. Ch., C.A. No. 10389, Allen, C. (January 31, 1989).

12. *E.g.*, *Revlon v. MacAndrews & Forbes Holdings, Inc.*, Del. Supr., 506 A.2d 173 (1986); *Mills Acquisition Co. v. Macmillan, Inc.*, Del. Ch., C.A. No. 10168, Jacobs, V.C. (October 17, 1988), *rev'd on other grounds*, Sec. L. Rep. (CCH) ¶ 94071 (Current) (1988); *In Re J.P. Stevens & Co., Inc. Shareholders Litigation*, Del. Ch., 542 A.2d 770 (1988); *Citron v. Fairchild Camera & Instrument Corp.*, Del. Ch.,

But what of a situation in which the board resists a sale?[13] May a board find itself thrust involuntarily into a Revlon mode in which it is required to take only steps designed to maximize current share value and in which it must desist from steps that would impede that goal, even if they might otherwise appear sustainable as an arguable step in the promotion of "long term" corporate or share values? *Revlon* did not address that subject but implied that a board might find itself in such a position when it said that the duty it spoke of arose "when the break-up of the company is inevitable." 506 A.2d at 182.

[11] More specifically for this case, what of a situation in which the holders of some 88% of the Company's stock in effect declare (by supporting the SWT tender offer either as offeror or as a tendering shareholder) that they do seek a current share value maximizing transaction now? Does a director's duty of loyalty to "the corporation and its shareholders" require a board, in the light of that fact alone, to enter a Revlon mode?[14] In those Delaware cases that have factually

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C.A. No. 6085, Allen, C. (May 19, 1988) (appeal pending); *In Re Fort Howard Corp. Shareholders Litigation*, Del. Ch., C.A. No. 9991, Allen, C. (August 8, 1988); *In Re Holly Farms Corporation Shareholders Litigation*, Del. Ch., C.A. No. 10350, Hartnett, V.C. (December 30, 1988); *In Re RJR Nabisco, Inc. Shareholders Litigation*, Del. Ch., C.A. No. 10389, Allen, C. (January 31, 1989).

13. The most pressing question in that connection is whether a management endorsed restructuring transaction proposed as a defense to a hostile tender offer must satisfy the *Revlon* test of being (or appearing reasonably to be) an *informed* (*see* note 8, *supra*) *good faith* attempt to maximize current share value. Most cases that have factually raised that question have tended to be analyzed under the *Unocal* test for defensive steps and not under *Revlon*. *See Grand Metropolitan PLC v. The Pillsbury Company*, Del. Ch., C.A. No. 10319, Duffy, J. (December 16, 1988); *City Capital Associates v. Interco Incorporated*, Del. Ch., C.A. No. 10105, Allen, C. (November 1, 1988), slip op. at 37-43; *Robert M. Bass Group, Inc. v. Edward P. Evans*, Del. Ch., C.A. No. 9953, Jacobs, V.C. (July 14, 1988); *AC Acquisition Corp. v. Anderson, Clayton & Co.*, Del. Ch., 519 A.2d 103 (1986). *But see Black & Decker v. American Standard, Inc.*, 682 F. Supp. 772 (D. Del. 1988). Analysis of this question would, of course, begin with the Supreme Court's opinion in *Ivanhoe Partners v. Newmont Mining*, Del. Supr., 535 A.2d 1334 (1987).

14. Questions of this type call upon one to ask, what is our model of corporate governance? "Shareholder democracy" is an appealing phrase, and the notion of shareholders as the ultimate voting constituency of the board has obvious pertinence, but that phrase would not constitute the only element in a well articulated model. While corporate democracy is a pertinent concept, a corporation is not a New England town meeting; directors, not shareholders, have responsibilities to manage the business and affairs of the corporation, subject however to a fiduciary obligation. Moreover, no matter what our model, it must be flexible enough to recognize that the contours of a duty of loyalty will be affected by the specific factual context in which it is claimed to arise (a shareholder resolution on a question of business

involved preponderant shareholder acceptance of a hostile tender offer, boards have, responding to their own view of their duty, proposed an alternative transaction—a management endorsed breakup transaction that, realistically viewed, constituted a functional alternative to the resisted sale.[15] Those cases, however, offer no judicial opinion on the question when, if ever, will a board's duty to "the corporation and its shareholders" require it to abandon concerns for "long term" values (and other constituencies) and enter a current share value maximizing mode. This, however, is the question referred to above that is raised by this case but need not now be decided in light of the particularities of the circumstances the directors of TW face.

B.

Those directors have apparently not thought that the existence of the SWT offer or the shareholders' reaction to it required them to deviate from their long term management plan for TW. In reaching this view, they have not concluded that they will in no event consider or pursue an extraordinary transaction designed to enhance current share value. Rather, they say that they will in this instance consider pursuing an extraordinary transaction if and when they are faced with an offer that they conclude is *bona fide*—that is, specifically one that does not contain the Approval Condition or the Financing Condition.

SWT says that this position is a ruse. It claims that its offer is undeniably "real." The financing of the offer is set. Substantial commitment fees have been paid to responsible intermediaries (Citibank and Donaldson, Lufkin & Jenrette) to assure availability and a large amount of capital has already been invested in acquiring a

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detail—should the company take tropical oils out of all of its processed food products, for example—might arguably be thought less likely to require loyal directors to affirmatively respond, than would a corresponding indication that a predominating proportion of shares sought a fundamental structural change). In all events, resolution of these questions and resort to some model or another to define the details of the relationship among directors, the corporation and its shareholders seems inescapably to involve normative questions, which are probably inherent in the word "loyalty."

15. *See Grand Metropolitan PLC v. The Pillsbury Company*, Del. Ch., C.A. No. 10319, Duffy, J. (December 16, 1988); *City Capital Associates v. Interco Incorporated*, Del. Ch., C.A. No. 10105, Allen, C. (November 1, 1988); *See also Robert M. Bass Group, Inc. v. Edward P. Evans*, Del. Ch., C.A. No. 9953, Jacobs, V.C. (July 18, 1988); *AC Acquisition Corp. v. Anderson, Clayton & Co.*, Del. Ch., 519 A.2d 103 (1986).

19% stake in TW. The only contingency that remains, as a practical matter, is the risk of a substantial adverse development with respect to the financial condition of TW. It claims the financing of this transaction is no more contingent, and indeed is far less so, than many or most uninvited tender offers.

Concerning the Approval Condition, SWT says that since it was "waived" on January 3, it can no longer be regarded as a significant matter. The particular form of waiver—a promise of a future waiver two days after the Rights are redeemed rather than a current waiver—is justified by sensible business concerns (*see* p. 14 above). The reality is that that Condition has been removed, SWT says, and that the TW directors are required to place so much weight upon it, is one measure of their determination to thwart the clear preference of the holders of a preponderant majority of the shares of the Company.

C.

[12] In few instances has this court issued an order requiring a board of directors to redeem a defensive stock rights plan. In those instances, the board itself had elected to pursue
either an outright sale of the company and had completed an auction process,[16] or had elected to pursue a defensive restructuring that in form and effect was (so far as the corporation itself was concerned) a close approximation of and an alternative to a pending all cash tender offer for all shares.[17] In those instances, it was thought that the central purpose of a pill—to give a board time to negotiate on shareholders' behalf or to consider alternatives to a tender offer or street sweep that threatened to coerce or otherwise injure shareholders—had been fully served. Those cases did not involve circumstances in which a board had in good faith (which appears to exist here) elected to continue managing the enterprise in a long term mode and not to actively consider an extraordinary transaction of any type. Thus, I must disagree that the issue posed by this case at this juncture is the same issue as was presented in those cases. Rather, I accept the TW directors' view that, at this stage of this

16. *Mills Acquisition Co. v. Macmillan, Inc.*, Del. Ch., C.A. No. 10168, Jacobs, V.C. (October 17, 1988), *rev'd on other grounds*, Fed. Sec. L. Rep. (CCH) ¶ 94071.

17. *Grand Metropolitan PLC v. The Pillsbury Company*, Del. Ch., C.A. No. 10319, Duffy, J. (December 16, 1988), slip op. at 21-23; *City Capital Associates v. Interco Incorporated*, Del. Ch., C.A. No. 10105, Allen C. (November 1, 1988).

matter, the pertinent question is whether they have breached a duty owed to the corporation and its shareholders in concluding that they are not required, under the present circumstances, to consider whether or not to place the corporation in a current share value maximizing mode.

[13-14] But addressing that question in the circumstances of this case involves one in considering an anomaly. Public tender offers are, or rather can be, change in control transactions that are functionally similar to merger transactions with respect to the critical question of control over the corporate enterprise.[18] Yet, under the corporation law, a board of directors which is given the critical role of initiating and recommending a merger to the shareholders (*see* 8 *Del. C.* § 251) traditionally has been accorded no statutory role whatsoever with respect to a public tender offer for even a controlling number of shares.[19] This distinctive treatment of board power with respect to mergers and tender offers is not satisfactorily explained by the observation that the corporation law statutes were basically designed in a period when large scale public tender offers were rarities; our statutes are too constantly and carefully massaged for such an explanation to account for much of the story. More likely, one would suppose, is the conceptual notion that tender offers essentially represent the sale of shareholders' separate property and such sales—even when aggregated into a single change in control transaction—require no "corporate" action and do not involve distinctively "corporate" interests.

This justification, however, would have no doubt been felt as ethereal, not to say illusory, by those responsible for the management of corporations as the public tender offer, particularly uninvited or hostile tender offers, became an increasingly common form of transaction in the 1970s. The so-called "poison pill" can, of course, be seen as an attempt to address the flaw (as some would see it) in the corporation law that gives a board of directors a critical role in

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18. The differences of course are many and they are not necessarily immaterial. The existence, for example, of a staggered board or class voting rights may make a successful public tender offer a less sure bet to deliver control than a merger.

19. Nor does the recent amendment to Section 203 of our corporation law statute confer a direct role upon the board with respect to tender offers even now. It does, however, confer an indirect role in granting power to the board to grant certain dispensations from the general proscription of "business combinations" involving an "interested stockholder." *See* 8 *Del. C.* § 203(a)(1), (3) and (b)(6).

mergers (and other extraordinary transactions)[20] but gives it no role with respect to public tender offers—a form of extraordinary transaction that threatens equivalent impacts upon the corporation and all of its constituencies including existing shareholders. Thus, with the development of that innovation, boards of directors began taking upon themselves, unilaterally in practically all instances, the power to reject a public tender offer (or more correctly, to preclude its completion as a practical matter) by adopting the poison pill stock rights plan.

[15] In *Moran v. Household International, Inc.*, Del. Supr., 500 A.2d 1346 (1985), our Supreme Court opined that Delaware corporations were authorized to issue securities of this type, but noted that there could be a self-serving aspect to the use of this power. It held that a board that took such power to itself would be held to a fiduciary standard when called upon to consider releasing the power (by redeeming the pill) in light of all of the circumstances of a particular tender offer. Significantly, the Supreme Court cited the *Unocal* case at this point in its opinion. *See Moran v. Household International, Inc.*, *supra*, at 1354. This court has understood that citation to mean that a decision not to redeem a pill in the face of a hostile tender offer is a defensive step that has to be "reasonable in relation to the threat posed" by such offer. *Grand Metropolitan PLC v. The Pillsbury Company*, *supra*; *City Capital Associates v. Interco Incorporated*, *supra*.

As a result, the disparity between the legal treatment of these functionally similar form of change in control transactions—mergers and public tender offers—continues. Should a court be required to review a decision not to pursue a merger, it would, in my opinion, ask itself the two fundamental questions that the business judgment form of judicial review requires: did the board reach that decision in good faith pursuit of legitimate corporate interests, and did it do so advisedly? Supposing that the plaintiff failed to persuade the court that the answer to either question was in the negative, the court would not go on to exercise even the restrained level of substantive review that *Unocal* contemplates. It would not ask whether the decision could be justified as "reasonable" in relation to anything else, as it is to do when the decision is to preclude a tender offer.

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20. *See, e.g.*, Section 275 (directors initiate dissolution); Section 271 (director action necessary to sell substantially all assets); Section 242 (directors must initiate amendment to corporate certificate).

This difference in judicial review of decisions not to pursue a merger opportunity and decisions to preclude a hostile tender offer can be rationalized by reference to the different statutory treatment of the board's role with respect to each form of transaction.

The offer of SWT involves *both* a proposal to negotiate a merger and a conditional tender offer precluded by a poison pill. Insofar as it constitutes a proposal to negotiate a merger, I understand the law to permit the board to decline it, with no threat of judicial sanction providing it functions on the question in good faith pursuit of legitimate corporate interests and advisedly. Here, I understand the board's motivation to include a plausible concern that the level of debt likely to be borne by TW following any merger would be detrimental to the long term functioning of the Company. The Denny's subsidiary particularly is in need of capital that would be less likely to be available if the SWT proposal were implemented. Concern with such long run implications is obviously legitimate, at least until a board turns away from long term management concerns and is required to focus upon the maximization of current share value. Since in most instances, and here, a decision to decline merger discussions will be part of a decision to continue to manage the corporation to enhance long term share value, the board's concern with distinctively corporate concerns of this type is legitimate and the good faith pursuit of them satisfies the first leg of the traditional business judgment form of analysis.

Nor is there any basis to question the board's due care in reaching the decision not to pursue merger discussions now. The board appears to be well advised and active. With respect to information that it has considered, I note that the TW board has not negotiated with SWT in order to determine what is the highest available merger price SWT would pay, but it has reason to believe it understands the range of prices SWT is talking about and to commence such talks in order to get more information would involve a heavy price in terms of the risks to its present strategy.

[16] By conditioning the closing of its tender offer upon the execution of a merger agreement, SWT has implicated not simply the self-conferred power arising from the stock Rights Plan, but the board's Section 251 power. I do not accept that SWT has waived the Agreement Condition. It has not done so. For whatever perceived advantage it sought, it has left that Condition in place in a modified form. By doing so, it continues to call upon the board to act under Section 251. The exercise of the board's power under that Section is, where there is no interested merger involved, subject to a tra-

ditional business judgment review, not the proportionality review of *Unocal*. Since SWT has chosen to proceed in a way that does require exercise of the TW board's Section 251 power, it cannot complain if the board's decision with respect to it is reviewed under the traditional business judgment approach.

In the circumstances as they now exist, the board is, in my opinion, justified in not further addressing the question whether it should deviate from its long term management mode in order to do a current value maximizing transaction; and surely before it has considered that question, it cannot be thought to have reached that stage at which it is under a duty to shareholders to dismantle its stock rights defense and permit the SWT offer to close.[21]

The pending motion will be denied.

IN RE VENTURE ADVISERS, INC.

No. 9439

Court of Chancery of the State of Delaware, New Castle

December 1, 1988

One of two 50% stockholders petitioned for dissolution alleging that they were unable to agree upon the desirability of discontinuing the joint venture and disposing of its assets. The other stockholder filed a motion to dismiss claiming that the two had never discussed the desirability of dissolving the joint venture nor had they attempted to reach an agreement on disposing the assets.

The court of chancery, per Vice-Chancellor Berger, concluded that a stockholder seeking dissolution pursuant to section 273 of the Delaware General Corporation Law may use any competent evidence

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21. I do agree with SWT that the Financing Condition, as the facts currently appear, would not alone provide a basis for the board to conclude correctly that it has no legal duty, in the circumstances, to consider fully whether its duty of loyalty requires it to enter a Revlon, or current share value maximizing, mode at this time. I note also my view that this question is not one of business judgment. It is, analogous to a mandamus action, a question whether a legal duty exists to make a business judgment in these circumstances.

to prove that the stockholders are unable to agree upon the desirability of discontinuing the joint venture and disposing of the joint venture assets. The court held that there were material facts in dispute as to whether the stockholders were unable to agree; therefore, summary judgment was precluded.

1. Judgment ⟸ 181(2)

A motion to dismiss or for summary judgment must be denied unless there are no material issues of fact in dispute, and the record establishes that the moving party is entitled to judgment as a matter of law. DEL. CH. CT. R. 12(b).

2. Corporations ⟸ 592 1/2

The purpose of section 273 is to provide a mechanism for dissolution that obviates a deadlocked vote of two equal shareholders. DEL. CODE ANN. tit. 8, § 273 (1953).

3. Corporations ⟸ 592 1/2

One of the critical inquiries under section 273 is whether there is a genuine inability to disagree. DEL. CODE ANN. tit. 8, § 273 (1953).

4. Corporations ⟸ 592 1/2

Section 273 does not specify the manner in which the "unable to agree" requirement must be satisfied. DEL. CODE ANN. tit. 8, § 273 (1953).

5. Corporations ⟸ 592, 606

If one of two stockholders gives notice to the other that he is seeking court ordered dissolution, the surrounding circumstances may provide sufficient evidence to prove that the stockholders were unable to agree even though there was no direct communication between the two.

6. Corporations ⟸ 592 1/2, 610(2)

A stockholder seeking dissolution pursuant to section 273 may use any competent evidence to prove that the stockholders were unable to agree upon the desirability of discontinuing the joint venture and disposing of the assets used in such a venture. DEL. CODE ANN. tit. 8, § 273(a) (1953).

Martin P. Tully, Esquire, and Michael Houghton, Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware, for plaintiff.

Kevin G. Abrams, Esquire, of Richards, Layton & Finger, Wilmington, Delaware, for defendant.

BERGER, *Vice-Chancellor*

On November 30, 1987, Thomas J. Sherwood ("Sherwood"), one of the two 50% stockholders of Venture Advisers, Inc. ("Venture Advisers"), filed a petition for dissolution of Venture Advisers pursuant to 8 *Del. C.* § 273. The petition alleges that Venture Advisers was formed as a joint venture between Sherwood and Steven Schiffer ("Schiffer"), the other 50% stockholder, to act as an investment adviser to a publicly registered limited partnership—Twenty-First Century Venture Partners I, L.P. ("TFCV"). Sherwood and Schiffer allegedly are "unable to agree upon the desirability of discontinuing the joint venture and disposing of the assets used in the joint venture." Petition, ¶ 6.

Schiffer responded by filing a motion to dismiss the petition on the ground that it was prematurely filed.[1] Schiffer claims that, contrary to the above-quoted allegation in the petition, the two stockholders have never discussed the desirability of dissolving Venture Advisers nor have they attempted to reach an agreement as to the disposition of the company's assets. This is the decision on Schiffer's motion to dismiss.

The relevant facts, as they appear from the complaint, the affidavits of Schiffer and Sherwood and the attachments thereto, may be summarized as follows. Sherwood and Schiffer have worked to-

1. Schiffer also contends that this Court lacks personal jurisdiction over him. However, he is not pursuing his jurisdictional argument at this time.

gether in several business entities for at least seven years. They have been officers, directors and substantial stockholders of Oryx Capital Corporation ("Oryx") since its formation in 1981. From 1983 until 1985 they were investment banking executives at D. H. Blair & Co., Inc. ("Blair"). J. Morton Davis ("Davis"), the President and Chairman of Blair, is also a substantial stockholder of Oryx. Sherwood and Schiffer are officers and directors of Venture Advisers and have been since its formation in 1984. Oryx and Venture Advisers are the Managing General Partner and Operating General Partner, respectively, of TFCV.

The business relationship between Sherwood and Schiffer deteriorated in 1987, if not before. On November 16, 1987, Sherwood and Davis, acting as the majority stockholders of Oryx, removed Schiffer as a director and officer of that company. Schiffer responded on November 23, 1987 by filing suit against Sherwood and Davis in the United States District Court for the Northern District of California (the "California Action"). Venture Advisers is one of the named plaintiffs in the California Action, which alleges, among other things, that Sherwood and the other defendants "conspired to defraud, take over control of and divert assets in an illegal attempt to take over the management and control of TFCV." *TFCV, et al. v. Sherwood, et al.*, Case No. C87 5774 CAI, in the United States District Court for the Northern District of California, ¶ 10. On the day that the California Action was filed, Schiffer obtained an *ex parte* temporary restraining order allowing him to control the operations and bank accounts of Oryx, TFCV and other entities controlled by TFCV. Schiffer then transferred approximately $318,000 of TFCV and Oryx funds into his personal bank account, apparently for the purpose of controlling those funds for business uses.

The temporary restraining order was modified by the U. S. District Court at a hearing on November 25, 1987, during which Schiffer was ordered to return the funds to the business accounts. At this hearing, Sherwood made the following statement, in the presence of Schiffer's California counsel:

> . . .I would argue that under the Delaware corporation law because I own 50 percent of Venture Advisers and because I disagree with the activities of Mr. Schiffer in the operation of Venture activities, Venture Advisers as it relates to the Fund that there's in effect a stalemate, and I have ordered counsel to prepare a certificate for the involuntary dissolution of that corporation.

Sherwood Aff., Ex. C at 20-21. Five days later, on November 30, 1987, Sherwood filed the petition for dissolution in this Court.

[1] The pending motion to dismiss will be treated as one for summary judgment since the parties are relying upon affidavits in support of their positions. The motion must be denied unless there are no material issues of fact in dispute and the record establishes that Schiffer is entitled to judgment as a matter of law. Chancery Court Rule 12(b); *Nash v. Connell*, Del. Ch., 99 A.2d 242 (1953). In an attempt to meet this burden, Schiffer relies upon the undisputed averments in his affidavit that: (1) Sherwood never communicated with Schiffer regarding the possibility or desirability of discontinuing Venture Advisers; and (2) Schiffer never refused to voluntarily dissolve the corporation. Schiffer Aff., ¶ 5.

Based upon this absence of direct communications between the two stockholders, Schiffer argues that the first prerequisite to a § 273 dissolution has not been satisfied. The statute provides that either of the 50% stockholders of a corporation engaged in a joint venture may petition to have the corporation dissolved "if such stockholders shall be unable to agree upon the desirability of discontinuing such joint venture and disposing of the assets used in such venture. . . ." 8 *Del. C.* § 273(a). According to Schiffer, the quoted portion of § 273(a) sets forth two conditions precedent to the filing of a petition: (1) that the stockholders are unable to agree upon the desirability of dissolving the corporation and (2) that they are also unable to agree upon a plan to distribute the corporation's assets. Since Schiffer was never asked whether he would agree to the dissolution of Venture Advisers and he never volunteered that he would oppose such action if asked, the record establishes that the first "unable to agree" requirement has not been satisfied.

Sherwood does not dispute the general proposition that the two stockholders must be unable to agree upon dissolution. He only objects to Schiffer's narrow interpretation of the statute. Sherwood argues that evidence of the circumstances surrounding the business relationship between the two stockholders and their conduct may be used to establish their inability to agree upon dissolution. Such evidence, according to Sherwood, is more than sufficient to satisfy the requirement of § 273 in this case.

The totality of the circumstances includes the fact that Schiffer and, at his direction, Venture Advisers filed suit against Sherwood one week before this petition was filed. The California Action charges, among other things, that Sherwood committed fraud, wasted and mismanaged corporate assets, breached his fiduciary duties and de-

famed Schiffer. In addition, at a hearing in the California Action on November 25, 1987, Sherwood stated that he had instructed counsel to file this petition for dissolution of Venture Advisers. At that hearing, the court repeatedly described the parties as being in the midst of a "divorce" and during the five days between that hearing and the filing of this petition, Schiffer did not indicate, either directly or through his representatives, that he would agree to the dissolution of Venture Advisers. Finally, Schiffer's affidavit is noteworthy for what it does not say. Schiffer states that he never discussed the possibility of dissolving Venture Advisers with Sherwood. However, he does not deny the allegation in the petition that he and Sherwood are unable to agree upon the dissolution of the company and disposition of its assets.

[2-5] The purpose of § 273 is to provide a mechanism for dissolution that "obviate(s) a deadlocked vote of two equal shareholders." *In re Data Processing Consultants, Ltd.*, Del. Ch., Civil Action No. 8907, Allen, C. (November 25, 1987) (slip op. at 3). One of the critical inquiries under § 273 is whether there is a "genuine inability to agree." *In re Arthur Treacher's Fish & Chips*, Del. Ch., Civil Action No. 5357, Marvel, C. (October 16, 1980) (slip op. at 7). Schiffer argues that, because the issues to be decided in a § 273 petition are limited and should be resolved in a summary manner, the "unable to agree" language of § 273 should be construed to require the two stockholders to take concrete steps to attempt agreement before coming to Court. Such an approach may be preferable, but I am not persuaded that it is required by the statute. Section 273 does not specify the manner in which the "unable to agree" requirement must be satisfied. Direct personal communication between the stockholders is one method, but there is nothing to suggest that it is the only one. If, as in this case, one of the two stockholders gives notice to the other that he is seeking court ordered dissolution, the surrounding circumstances may provide sufficient evidence to prove that the stockholders were unable to agree even though there was no direct communication between the two.

As noted above, Schiffer also contends that there is a second requirement under § 273—that the stockholders are unable to agree upon a disposition of the corporation's assets. From the present record, it appears that the stockholders did not give any joint consideration to a possible plan of distribution. However, as with the first statutory requirement, I am satisfied that direct communication between the stockholders is not the only form of evidence that may be used to prove that the two stockholders are unable to agree upon

a plan of distribution. Indeed, it seems almost axiomatic that a stockholder opposing dissolution would also oppose any plan to dispose of corporate assets in the context of a dissolution.

[6] In short, I conclude that a stockholder seeking dissolution pursuant to § 273 may use any competent evidence to prove that the stockholders are "unable to agree upon the desirability of discontinuing [the] joint venture and disposing of the assets used in such venture. . . ." 8 *Del. C.* § 273(a). The remaining issue is whether, on the present record, either stockholder is entitled to relief. It should be evident from the foregoing that Schiffer's motion for summary judgment must be denied. That motion was predicated upon the legal premise that the requirements of the statute may not be satisfied without direct communication between the two stockholders. That legal premise has been rejected and the record evidence of the hostility between the two stockholders is sufficient to make a *prima facie* showing that they were unable to agree upon dissolution. Accordingly, to the extent that Schiffer continues to contest Sherwood's claim on this issue, there are material facts in dispute precluding the award of summary judgment.

Sherwood, in his Answering Brief, suggests that he is entitled to summary judgment. However, it is not clear whether, under a totality of the circumstances test, Schiffer disputes Sherwood's claim as to their disagreement. If Sherwood believes that this issue is ripe for summary judgment and wishes to bring it on prior to trial, he should file an appropriate motion and Schiffer and the Court will respond in due course.

ERRATA

Page thirty-five. Insert the following as a second paragraph in the *:

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