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DELAWARE SUPREME COURT  
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Wilmington

BARNETT STEPAC, )  
 )  
 Appellant, )  
 Objector-Below )  
 )  
 v. )  
 )  
 JOSEPH SULLIVAN and ALAN BRODY, )  
 )  
 Plaintiffs Below, )  
 )  
 and )  
 )  
 DR. ARMAND HAMMER, OCCIDENTAL )  
 PETROLEUM CORPORATION, DR. RAY )  
 IRANI, ARTHUR B. KRIM, MORRIE )  
 A. MOSS, AZIZ D. SYRIANI, O.C. )  
 DAVIS, SENATOR ALBERT GORE, )  
 ARTHUR GROMAN, MICHAEL A. HAMMER, )  
 DAVID A. HENTSCHEL, J. ROGER )  
 HIRL, JOHN KLUGE, LOUIS NIZER, )  
 GEORGE O. NOLLEY, DR. C. ERWIN )  
 PIPER, GERALD M. STERN, ROSEMARY )  
 TOMICH, )  
 )  
 Defendants Below, )  
 )  
 and )  
 )  
 THE ARMAND HAMMER MUSEUM OF )  
 ART AND CULTURAL CENTER, INC., )  
 )  
 Intervenor-Defendant )  
 Below, )  
 )  
 Appellees. )

No. 312, 1990

APPEAL FROM ORDER  
ENTERED BY THE COURT  
OF CHANCERY OR THE  
STATE OF DELAWARE IN  
AND FOR NEW CASTLE  
COUNTY ON AUGUST 7,  
1990 IN CIVIL ACTION  
NO. 10823.


APPELLANT'S STATEMENT IN LIEU OF  
REPLY BRIEF

Appellant in the captioned action, as and for its  
reply brief, hereby concurs in and adopts the reply brief filed  
by appellants Alan R. Kahn (No. 301, 1990) and California

Public Employees Retirement System (No. 313, 1990) in their  
respective actions.

SCHLUSSER, REIVER, HUGHES,  
& SISK

Dated: 12/14/90



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THE ARMAND HAMMER MUSEUM OF )  
ART AND CULTURAL CENTER, INC. )

Intervenor-Defendant )  
Below, )

Appellees. )

ANSWERING BRIEF OF APPELLEES  
ARTHUR B. KRIM, AZIZ D. SYRIANI,  
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(Constituting the Special Committee  
of Occidental's Board of Directors)

November 21, 1990

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**THE NATURE OF THE PROCEEDING  
AND THE ORDER SOUGHT TO BE REVIEWED**

This is an appeal from the approval of the settlement of one of three civil actions brought in the Court of Chancery ("the Court Below") by certain shareholders of Occidental Petroleum Corporation ("Occidental") challenging a decision by Occidental's board of directors to fund a charitable donation in support of the arts. The theory of all three actions is an alleged waste of corporate assets.

The plaintiffs in this action,<sup>1</sup> Joseph Sullivan and Alan Brody, agreed to a settlement of their class and derivative suit subject to the approval of the Court Below. The settlement was reached with the concurrence of a special committee of Occidental's outside directors ("the Special Committee"). The plaintiffs in the other two actions,<sup>2</sup> Alan R. Kahn and Barnett Stepak, opposed the settlement. The California Public Employees Retirement System ("CalPERS") was permitted to intervene as a shareholder plaintiff in the Kahn action and it too objected to the proposed settlement.

On April 4, 1990 a settlement hearing was held. By Memorandum Opinion of August 7, 1990, the Court Below found the terms of the settlement to be fair and reasonable and ordered that the settlement be approved. Kahn, CalPERS and

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<sup>1</sup>Sullivan, et al. v. Hammer, et al., C.A. No. 10823 ("the Sullivan action").

<sup>2</sup>Kahn v. Occidental Petroleum Corporation, et al., C.A. No. 10808 ("the Kahn action"); Stepak v. Hammer, et al., C.A. No. 10860 ("the Stepak action").

Stepak ("the Objectors Below") have each appealed from that decision and order. The grounds for the appeals are that the Court Below allegedly abused its discretion.

This is the brief of the Special Committee in answer to the briefs of Kahn and CalPERS. The objector Stepak filed no separate brief.

#### SUMMARY OF ARGUMENT

The Court Below did not abuse its discretion in approving the settlement as charged by the Objectors Below because:

1. DENIED. In approving the settlement the Court Below, as it was required to do, considered the possible defenses to the plaintiffs' claims and was persuaded that the plaintiffs would likely be unsuccessful at any final determination on the merits. The Court Below concluded that it was highly probable that the decision made by a Special Committee of Occidental's board of directors to approve the charitable contribution would be protected by the presumption of the Delaware business judgment rule. This conclusion by the Court Below is supported by the record and was the product of an orderly and logical deductive process. The evidence available to establish that the Special Committee made an informed decision far outweighs any insinuations to the contrary relied upon by the Objectors Below.

2. DENIED. The finding of the Court Below that Occidental's charitable contribution is within the range of

reasonableness and that it was reasonably probable that plaintiffs would fail on their claim of waste is also supported by the record and was the product of an orderly and logical deductive process. The corporate gift meets the test of reasonableness established by Delaware precedent. How Occidental came to be presented with the opportunity to associate itself with a worthy charitable endeavor which will also serve to enhance its public image is immaterial to an otherwise reasonable decision made by the Special Committee of Occidental's board as to how best to have the corporation avail itself of that opportunity.

3. DENIED. The consideration received for the settlement of the plaintiffs' claims is adequate when measured by the meager potential for their chances of success.

#### STATEMENT OF FACTS<sup>3</sup>

Occidental is a Delaware corporation. Dr. Armand Hammer is its Chief Executive Officer and Chairman of its board of directors. In 1957 when Dr. Hammer first invested in Occidental it had \$34,000 in assets and three employees. Occidental has since become one of the leading industrial companies in the world. B-439; B-440; B-465; B-469 to B-473.

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<sup>3</sup>As used in this brief, A-\_\_\_\_\_ refers to the Joint Appendix Of The Appellants; B-\_\_\_\_\_ refers to the Joint Appendix Of The Appellees; D.E. \_\_\_\_\_ refers to docket entry numbers in the record of the Court Below.

Currently, it has more than 50,000 employees and approximately 495,000 shareholders. B-477; D.E. 97 (A-4). It has some 290 million shares of stock outstanding. B-475. For the year ending December 31, 1988 it had assets of approximately \$20 billion, operating revenues of \$20 billion and pre-tax earnings of \$574 million. B-440; B-478. It maintains its corporate headquarters in the Westwood community of Los Angeles, California on property located at the corner of Wilshire Boulevard and Westwood Avenue. B-102.

Armand Hammer has been the person primarily responsible for Occidental's rise to its present position of prominence in the business world. B-440. Dr. Hammer is a remarkable person in his own right. He is presently 92 years of age, but is still active and oversees the operations of the company. B-97. He is well known as an industrialist and philanthropist. He has traveled all over the world in an effort to build good will and business for Occidental. B-97; B-441. He has met with heads of state as a strong advocate of world peace. In his travels and his many philanthropies he has been identified with Occidental. B-441.

#### 1. The Genesis of the Challenged Transaction

Since the early 1920's, Dr. Hammer has built one of the world's great private art collections. B-87 to B-91; B-423; B-440. Dr. Hammer and The Armand Hammer Foundation (the "Foundation") currently own three major collections valued at

\$300-\$400 million: "Five Centuries of Art", a collection of more than 100 works by masters such as Rembrandt, Rubens, Renoir and Van Gogh; the Codex Hammer, a rare manuscript by Leonardo da Vinci; and the world's most extensive private collection of paintings, lithographs and bronzes by the great French satirist Honore' Daumier (hereafter "the Art Collection" or "the Collection").<sup>4</sup> B-88 to B-91; B-423; B-428; B-440; B-441.

As an oil and chemical company that frequently confronts controversial issues, Occidental is often subjected to public criticism. Because Occidental's primary business activities are not done at the retail or consumer level, it does very little consumer advertising. To counterbalance and negate adverse publicity and improve its public image, Occidental's Board of Directors has exercised its business judgment to take a highly visible role in support of the arts and other public benefit charities. B-440.

Historically, the board of directors of Occidental has determined that it is in the best interest of the company to support and promote the acquisition and exhibition of Dr. Hammer's and the Foundation's Art Collection. A-345; A-349; A-350; B-107; B-108; B-441; B-450. Through Occidental's financial support and sponsorship, the Art Collection has been viewed by more than eight million people in more than 25

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<sup>4</sup>For a pictorial account of the Art Collection see John Walker, The Armand Hammer Collection (1982), at D.E. 68 (B-4) in the Kahn action.

American cities and at least 18 foreign countries. B-98; B-441. The vast majority of these exhibitions have been in areas where Occidental has operations or was negotiating business contracts. B-98; B-441 to B-448; B-483 to B-652. In return, Occidental has received world-wide public recognition. A-164 to A-168; A-345 to A-346; B-441.

Occidental's exhibition of the Art Collection has provided the company with extensive publicity and advertising, a brighter public reputation and an improved corporate image. B-97; B-98; B-441. Sponsorship of exhibitions of the Art Collection has also generated immeasurable goodwill that has materially assisted the company in securing numerous lucrative business contracts with foreign governments, including Peru, Great Britain, the Soviet Union, Japan, Italy and China. B-62; B-63; B-441 to B-448; B-483 to B-652. Occidental's Annual Reports have disclosed the benefits and goodwill that the corporation has received from providing financial support for the Collection. B-448 to B-449; B-481; B-744 to B-751.

Although Dr. Hammer originally intended to donate the Collection to the Los Angeles County Museum of Art ("LACMA"), he was unable to receive satisfactory assurances relating to the care, treatment and preservation of the Collection as an entity. A-91; A-92; B-762 to B-767. Contrary to the assertions of the Objectors Below, the conditions requested by Dr. Hammer relating to LACMA's

treatment and care of the Collection were reasonable and typical of other large art donors. B-420 to B-426; B-767 to B-769. After Dr. Hammer had determined not to donate the Art Collection to LACMA, he offered a proposal to Occidental that would keep the Collection associated with Occidental and prevent it from being lost to the people of Los Angeles and perhaps the United States.<sup>5</sup>

**2. The Museum Proposal As Approved  
By A Special Committee Of  
Independent Outside Directors**

Dr. Hammer's proposal was subsequently approved on behalf of Occidental by a Special Committee of its independent outside directors, none of whom had any self-interest in the transaction. The Special Committee consisted of distinguished and successful individuals who collectively have more than 80 years of service on Occidental's board of directors. A-338 to A-340 . In alphabetical order they are as follows:

- Senator Albert Gore, 82, an attorney, a United States Congressman from Tennessee from 1939 to

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<sup>5</sup>Appellants' assertions that Occidental had previously contributed funds to LACMA in preparation for the Collection is inaccurate and irrelevant. There is ample evidence in the record that Occidental has and will continue to be recognized by LACMA for its \$2 million contribution to LACMA for construction of an escalator and bridge, as well as for its support of that museum in general. B-430 to B-436. Moreover, as conceded by LACMA's President, Daniel Belin, in a letter to Dr. Hammer, "the 1980 Museum Agreement never was understood by [LACMA's trustees] to incorporate a binding obligation upon [Dr. Hammer] or the Hammer Foundation to make gifts to the Museum." (Emphasis added.) A-147.

1953 and a United States Senator from Tennessee from 1953 to 1971. Senator Gore has also served as a delegate to the United Nations during the Kennedy administration and is the former chairman of the board of Island Creek Coal Company. Senator Gore has been a director of Occidental for 18 years.

-- John W. Kluge, 75, President and Chairman of the Board of Metromedia Corporation, a major independent broadcasting and outdoor advertising company. Mr. Kluge also serves on the boards of Orion Pictures Corporation, Bear Stearns Companies, CONAIR, the Shubert Foundation and The United Cerebral Palsy Association, among others. He is also a Governor of the New York College of Osteopathic Medicine, a Trustee of the Preventive Medicine Institute - Strang Clinic and a member of the Advisory Committee of Manufacturers Hanover Trust Company.<sup>6</sup> Mr. Kluge has been a director of Occidental for 6 years.

-- Arthur B. Krim, 80, Chairman of the Board of Orion Pictures Corporation. An attorney

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<sup>6</sup>Mr. Kluge was reported by Forbes Magazine during 1989 to be the wealthiest man in the United States.

formerly associated with the New York firm of Phillips, Nizer, Benjamin, Krim & Ballon for 37 years, Mr. Krim was also President of United Artists Corporation from 1951 to 1969. He is currently Chairman Emeritus of the Board of Trustees of Columbia University. Mr. Krim has been a director of Occidental for 14 years.

-- Louis Nizer, 88, senior partner of the law firm of Phillips, Nizer, Benjamin, Krim & Ballon and a trial attorney and author of well-known reputation. In addition to his skills and successes as an attorney, Mr. Nizer has authored nine best-selling books, including My Life In Court. Mr. Nizer has been a director of Occidental for 8 years.

-- George O. Nolley, 74, a rancher and farmer since 1961 was also the founder, an officer and a director of the Permian Corporation, which subsequently became a wholly-owned subsidiary of Occidental. Mr. Nolley has been a director of Occidental for 7 years.

-- Dr. C. Erwin Piper, 81, from 1941 to 1961 a special agent for the Federal Bureau of Investigation, serving as Agent in Charge of the Honolulu, Memphis, Indianapolis and San

Diego offices. Dr. Piper thereafter served as City Administrative Officer for the City of Los Angeles from 1962 until his retirement in 1979. Dr. Piper has been a director of Occidental for 10 years.

-- Aziz D. Syriani, 48, since 1978 the President and Chief Operating Officer of The Olayan Group of Companies, a diversified trading, services and investment organization with interests in the Middle East and elsewhere. Mr. Syriani is a graduate of Harvard Law School and was formerly outside legal counsel to the organization he now oversees. He has been a director of Occidental for 7 years.

-- Rosemary Tomich, 52, owner since 1958 of Hope Cattle Company and since 1970 of A. S. Tomich Construction Company, and Chairman and Chief Executive Officer of Livestock Clearing, Inc. Miss Tomich is also a Trustee of the Salk Institute for Biological Studies and a member of the Board of Regents of Loyola Marymount University. She has been a director of Occidental for 10 years. B-331 to B-337.

The museum proposal presented by Dr. Hammer and eventually approved by the Special Committee included the following provisions:

(1) A non-profit corporation would be formed under Delaware law to own and exhibit the art. It would seek a determination by the Internal Revenue Service that it would be a tax-exempt entity under Section 501(c)(3) of the Internal Revenue Code;

(2) Dr. Hammer and the Foundation would transfer their Art Collection to this new corporation which would exhibit it and would also assume the Foundation's contract establishing the Armand Hammer Center for Leonardo Studies at UCLA;

(3) Occidental would construct a parking garage for its own use, a new museum building and undertake certain renovations to four floors of the Occidental headquarters building adjacent to the proposed museum at a total cost estimated at the time to be \$50 million;

(4) Occidental would lease the museum building and the four floors of Occidental's headquarters building to the new corporation, to be known as The Armand Hammer Museum of Art and Cultural Center ("the Museum"), rent-free for a term of 30 years, with the Museum being responsible for all utilities and maintenance expenses and Occidental paying only the property taxes;

(5) In order to ensure predictable financial support during the Museum's initial years, Occidental would purchase a 30-year annuity or other financial arrangement at

an estimated cost of \$35.6 million (projected to be \$23.5 million after taxes);

(6) Occidental would give the Museum an option to purchase the museum building, the parking garage and the Occidental office building in 30 years for \$55 million, the current estimated value of the property at the time of the exercise of the option; and

(7) Occidental would have representatives on the board of directors of the Museum, would be given appropriate public recognition for its role in establishing the museum (for example, naming the courtyard, library or auditorium for Occidental) and would have the right to use the museum facilities and have "corporate sponsor" rights. B-313 to B-317.

The parking garage would be constructed beneath the museum building primarily for the commercial use of Occidental and would not be leased to the Museum. A-165; A-168; B-314. Likewise, unless and until the option to purchase would be exercised by the Museum, the office building would also remain the property of Occidental.<sup>4</sup> B-314 to B-315.

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<sup>4</sup>The Special Committee was eventually advised that under applicable accounting and Internal Revenue Service Rules, the purchase price of the annuity would be deductible in the year of its purchase, 1989, but the cost of construction of the art museum building and renovations to the office building would not be deductible as a charitable contribution. Instead, Occidental would amortize the art museum building, parking garage and renovated office space over their useful lives, expected to be 30 years. B-123 to B-125.

### 3. Preliminary Approval Of The Proposal By Occidental

For a period in excess of one year, the record reflects constant oversight and control by Occidental's Board of Directors from the earliest stages of the Museum project to its final approval. A-164 to A-169; A-334 to A-346; A-348 to A-351; B-112; B-113; B-283 to B-287; B-299 to B-323. It was on January 19, 1988, at a meeting of the Executive Committee of the Board of Directors that Dr. Hammer first proposed the establishment and construction of a museum to house the Art Collection. A-164 to A-166. After discussion of Occidental's historical and beneficial identification with the Art Collection, as well as consideration of contributions by other corporations to other museums, the Executive Committee (Dr. Hammer abstained as did the defendant Groman because he is a director of the Foundation) unanimously resolved that it was in Occidental's best interest to commence preliminary design of an art museum to be built adjacent to Occidental's corporate headquarters on the property in the Westwood area of Los Angeles. A-167 to A-168.

Also at this Executive Committee meeting, the need to expand Occidental's parking facilities was recognized as warranting action by Occidental's corporate officers. A-165; A-168. The Executive Committee therefore expressly authorized Occidental to enter into the negotiation of agreements and contracts necessary to carry out the proposed project,

including negotiations of arrangements for the design and construction of the museum and underground parking garage which would remain the property of Occidental. A-168. The Executive Committee decided further that once the art museum project was substantially defined, the project would be subject to further review and authorization by a disinterested majority of the board of directors. A-168.

Less than a month later on February 11, 1988, the Board of Directors, at a regular meeting and after discussion of the proposal, unanimously expressed its approval of the actions taken by the Executive Committee with respect to the art museum proposal. A-354 to A-355.

Thereafter, Occidental publicly disclosed its preliminary plan for construction of The Armand Hammer Museum of Art ("the Museum") in its 1987 Annual Report. B-751.

In accordance with the January 19, 1988 Executive Committee meeting resolutions and minutes, construction of the parking garage commenced sometime in the fall of 1988. The need for a construction bond for that construction was presented to and unanimously approved by the Board at its November 10, 1988 regular meeting. B-112; B-113.

On December 15, 1988, a detailed plan for the art museum project was presented to the full Board of Directors. After approving the preliminary concept, the Board determined that a thorough study of the proposal should be prepared defining the scope and magnitude of the proposal and ad-



building for an estimated \$27 million, construction of a parking garage for an estimated \$23 million and the grant of an option to purchase the museum site in 30 years, (ii) an analysis of the size of the proposed donation, including the effect on the company's financial condition; (iii) the potential for goodwill and other benefits to Occidental; and (iv) a comparison of the proposed contribution to other corporate contributions. The memorandum also addressed in detail tax issues associated with the art museum project and other corporate income tax issues. A-336; A-337; B-60; B-61; B-115 to B-253.

On February 10, 1989, each board member received a supplemental tax opinion letter from Skadden, Arps relating to the proposal, and a consulting report from the Duncan Appraisal Corporation that addressed the option price for the Museum's purchase of Occidental's headquarters building, museum facility and parking garage in 30 years as contemplated by the proposal. A-336; A-337; B-255 to B-277.

On February 16, 1989, at a regular meeting of the Board of Directors, an analysis of the terms of Occidental's proposed charitable contribution was presented. A-337; B-283 to B-287. The Board then resolved unanimously to appoint a Special Committee of its eight disinterested, outside directors to consider and act on the art museum proposal. A-337 to A-340; B-283 to B-285. As discussed above, the de-

fendants Gore, Kluge, Krim, Nizer, Nolley, Syriani, Tomich and Piper were named to constitute the Special Committee.

After discussion and additional review of the proposal, the Special Committee determined that the establishment of the Museum adjacent to Occidental's corporate offices in Los Angeles would provide good will and benefits to Occidental and its employees for at least the 30-year term of the rent-free lease and possibly longer. A-340 to A-341. Thus, on February 16, 1989 the Special Committee unanimously approved the proposal, subject, however, to the following conditions:

(1) incorporation of the Museum as a non-profit corporation under Delaware law;

(2) a determination by the Internal Revenue Service that the Museum would be a tax-exempt entity as defined in Section 501(c) of the Internal Revenue Code;

(3) supplementation of the February 6, 1989 opinion letter to reflect the tax issues discussed at the meeting, including the question of self-dealing; and,

(4) execution of documents in a form satisfactory to the Special Committee relating to (a) the lease of the museum facilities to the Museum, (b) the Museum's option to purchase Occidental's headquarters site at the end of 30 years, (c) Occidental's lease-back rights if the option was exercised, and (d) a legally binding agreement, including a full inventory of the art, for the transfer of the Art

Collection from the Foundation and Dr. Hammer to the Museum. A-341 to A-342; B-309; B-310.

The question of the then ongoing construction was also discussed. Since construction was for an underground parking garage to be utilized by Occidental's employees, the Special Committee decided to continue construction of the parking garage while it proceeded to oversee the art museum project. A-342; B-307; B-308; B-310.

In the Proxy Statement for its May 26, 1989 annual meeting, Occidental reported the Special Committee's approval of the Museum project to its shareholders and described the costs associated with the project. B-339. On May 15, 1989, Occidental issued a supplement to its Proxy Statement. The supplement included, inter alia, identification of the directors serving on the Special Committee, additional details regarding the total cost of the proposed annuity, and information regarding Occidental's then existing option to purchase the Los Angeles headquarters property.<sup>5</sup> B-54; B-55; B-357; B-358.

##### 5. The Shareholder Actions

Thereafter, without first making demand on the Board of Directors, two shareholder actions were filed in

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<sup>5</sup>Contrary to the Objector Kahn's unsubstantiated assertion (Kahn Br. at 5), Occidental's 1987 acquisition of an option to purchase its Los Angeles headquarters property had nothing to do with Dr. Hammer's later dispute with LACMA. In fact, Occidental had been trying to purchase its headquarters building for business reasons well before Dr. Hammer's dispute with LACMA. B-99; B-100; B-102; B-103.

the Court Below challenging Occidental's decision to establish and fund the art museum -- the Kahn action on May 2, 1989, and the Sullivan action on May 9, 1989.<sup>6</sup> A third action, the Stepak action was filed on May 31, 1989. Motions were promptly filed to dismiss these actions.

Attorneys for the plaintiffs in the Sullivan action then entered into negotiations with defendants for the settlement of that action. B-11 to B-13; B-27 to B-52. An effort to include the attorney for the plaintiff in the Kahn action in the negotiations was also made, but proved unsuccessful. B-44 to B-46. On June 3, 1989, after document disclosure to the lawyers in the Sullivan action, the parties entered into a written Memorandum of Understanding setting forth the general terms of a proposed settlement of the Sullivan action. B-13; B-18 to B-23. The settlement was subject to the right of the plaintiffs to engage in additional discovery to confirm the fairness and adequacy of the terms of the proposed settlement.

On June 26, 1989, the Internal Revenue Service granted the Museum's request for public charity status. A-344; B-360 to B-376.

On July 18, 1989, each member of the Special Committee received the following documents relating to the

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<sup>6</sup>On May 11, 1989, Martin and Evelyn Levitan, along with plaintiffs Sullivan and Brody, filed a related action in the Superior Court of the State of California.

conditions they had imposed on February 16, 1989 on any final approval of the museum project:

1. A copy of the certificate of incorporation for The Armand Hammer Museum of Art and Cultural Center, Inc. dated May 2, 1989;
2. Copies of the June 26, 1989 letters from the Internal Revenue Service stating that the Museum qualified under Section 501(c)(3) of the Internal Revenue Code as a tax-exempt charitable organization;
3. A draft form of a July 1989 opinion letter to be rendered by Skadden, Arps as counsel for the Museum.
4. A draft form of a July 1989 opinion letter to be rendered by the Dilworth firm as counsel to the Special Committee;
5. A draft lease and option agreement relating to the lease of the museum complex to the Museum, the Museum's option to purchase the museum complex, parking garage and headquarters building from Occidental in 30 years and Occidental's right to lease back the headquarters building from the Museum;
6. The Memorandum of Understanding for settling the Sullivan action; and

7. A February 6, 1989 opinion letter from the Dilworth firm.

A-493(b); A-493(c).

On July 20, 1989, the Special Committee met to discuss the art museum proposal in light of the foregoing documents. A-493(c). At the meeting the Special Committee also received a list of the works of art being transferred by the Foundation and the proposed agreement between Dr. Hammer, the Foundation, Occidental and the Museum for the transfer of the Art Collection to the Museum (the "Transfer Agreement"). A-493(c). After the Transfer Agreement had been revised by the Special Committee,, the Committee unanimously resolved that the conditions imposed on February 16, 1989 had been satisfied and authorized Occidental's officers to enter into the lease agreement with the Museum and to purchase the annuity for the benefit of the Museum as contemplated by the initial proposal. A-493(c).

During the interim, the plaintiff in the Kahn action had moved for a preliminary injunction to enjoin any settlement of the Sullivan action. A hearing was held on that application on July 7, 1989. By decision and order of July 19, 1989 the application was denied. A-369 to A-382. However, the Court Below did see fit to set forth certain concerns it had at the time with the proposed settlement. A-381.

At its July 20 meeting, the Special Committee reviewed the July 19, 1989 decision and order of the Court Below denying the injunctive relief in the Kahn action. To allay any concern that the Court Below had as to the independence of the Special Committee's then counsel, it was unanimously resolved that independent Delaware Counsel having no prior connection to Occidental or its officers, would be retained to advise the Special Committee with respect to the art museum proposal and the terms of any settlement of the Delaware litigation. A-493(d).

On August 4, 1989, the Special Committee met and retained the Delaware law firm of Morris, James, Hitchens & Williams as independent special counsel. A-493(d). On August 14, 1989, the Special Committee met with its Delaware counsel to discuss the various lawsuits that had been filed and the terms of the proposed settlement agreement. A-493(d) to A-493(e). The Special Committee met again on September 20, 1989 and, after discussion with its new Delaware counsel, reviewed and confirmed its prior actions. A-493(e).

On October 6, 1989, the Board of Directors resolved by unanimous written consent that the Special Committee be given full authority to settle and resolve the Delaware litigation on behalf of Occidental. A-493(f). Thereafter, its counsel submitted a written report to the Special Committee relating to the advisability of settlement. On October 19, 1989 a telephone meeting of the Special Committee

was held and additional questions relating to the settlement were submitted to its counsel. A-493(f).

In early November 1989, each member of the Special Committee received a draft of the form of the Stipulation of Settlement of the Delaware litigation, a revised Transfer Agreement per the Special Committee's September 20, 1989 request, and an abstract and analysis of the Transfer Agreement prepared by its independent counsel. A-493(f).

On November 16, 1989 a meeting of the Special Committee was held at Occidental's headquarters in Los Angeles. The Transfer Agreement and the Stipulation of Settlement were discussed in detail by the members of the Special Committee with their independent counsel and as a result the form of Stipulation of Settlement was unanimously approved. A-493(f) to A-493(g).

On March 29, 1990, the Special Committee met in New York to consider a request to approve the expenditure of an additional \$10 million by Occidental to complete the construction of the museum facilities. Prior to this meeting, the Special Committee received certain construction documents and Occidental's March 7, 1990 construction budget. A-493(g). At the meeting the Special Committee was again advised by its new Delaware counsel. Dr. Ronald Asquith, Occidental's Vice President in charge of the museum construction, reported to the Committee on the status of the construction project, the moneys expended through that date, why

an additional \$10 million was needed to complete the project, the basis for cost overruns and the status of deferred areas of the project. A-493(h). After review of the request, the Special Committee approved the additional expenditures. A-493(h) to A-493(i).

On April 4, 1990 a hearing on the proposed settlement of the Sullivan action was held. By decision and order of August 7, 1990, the Court Below found the settlement to be reasonable under the circumstances, holding, among other things, that the settlement "must be approved because, on balance, the claims asserted would likely be dismissed before or after trial because they all fall within the ambit of the business judgment rule." A-497.

#### ARGUMENT

I. **In Approving The Settlement The Court Below Did Not Abuse Its Discretion By Taking Into Consideration The Likelihood That The Presumption Of The Business Judgment Rule Would Require The Dismissal Of Plaintiffs' Claims Before Or After Trial**

A. **Standard And Scope of Review**

The standard of review is whether under all the facts and circumstances the Court Below abused its discretion in approving the settlement. Polk v. Good, Del.Supr., 507 A.2d 531 (1986); Neponsit Inv. Co. v. Abramson, Del.Supr., 405 A.2d 97 (1979); Rome v. Archer, Del.Supr., 197 A.2d 49

(1964). In applying that standard, this Court does not review the record to make its own determination of the intrinsic fairness of the settlement nor does it exercise its own business judgment respecting its merits. Nottingham Partners v. Dana, Del.Supr., 564 A.2d 1089 (1989); Polk v. Good, supra. Because the Court Below is in the best position to evaluate the factors that support a settlement, this Court will not second-guess its business judgment on appeal. Barkan v. Amsted Industries, Inc., Del.Supr., 567 A.2d 1279 (1989). For this Court to set aside a settlement which has been found by the Court Below to be fair and reasonable, it must find that the evidence in the record is so strongly to the contrary of that conclusion as to amount to an abuse of discretion by the Court Below. Nottingham Partners v. Dana, supra; Rome v. Archer, supra.

The scope of review requires this Court to consider the entire record in the Court Below. Nottingham Partners v. Dana, supra. But while this Court has the authority to review the entire record and make its own findings of fact in a proper case, it does not ignore the findings and conclusions of the Court Below. Polk v. Good, supra. If they are supported by the record and are the product of an orderly and logical deductive process, they will be accepted and the decision of the Court Below will be affirmed. Barkan v. Amsted Industries, Inc., supra; Levitt v. Bouvier, Del.Supr., 287 A.2d 671 (1972).

## B. The Merits Of The Argument

The Court Below found the record to show "that the directors and the Special Committee gave due consideration to the transaction". A-509. From this and other factors it concluded that it was "highly probable" on a final determination that it "would find that the decisions of the directors are entitled to the presumption of propriety afforded by the business judgment rule", A-509, and that because of this the plaintiffs' "potential for ultimate success on the merits here is, realistically, very poor." A-508. The Court Below took this circumstance into consideration both in approving the terms of the settlement and in reducing the amount of counsel fees sought by the plaintiffs. A-508 to A-513. In reaching this logical conclusion, the Court Below was amply supported by both the law and the record. Its decision should be affirmed.

The policy of Delaware law favors the voluntary settlement of class and derivative actions. Neponsit Inv. Co. v. Abramson, supra; Rome v. Archer, supra. The Court Below plays the role of a fiduciary in its review of such settlements and must balance the policy for preference for settlement against the need that the interests of the class or corporation have been fairly represented. All challenges to the fairness of the settlement must be considered, but in so doing the Court Below is under no obligation to actually try the issues presented. In re Resorts International

Shareholders Litigation Appeals, Del.Supr., 570 A.2d 259 (1990); Barkan v. Amsted Industries, Inc., supra. What the Court Below is required to do is "to consider the nature of the claim, the possible defenses thereto, the legal and factual circumstances of the case, and then to apply its own business judgment in deciding whether the settlement is reasonable in light of these factors." Polk v. Good, supra, at 507 A.2d 535; Barkan v. Amsted Industries, Inc., supra; Rome v. Archer, supra. The Court Below must be probing in its consideration of the issues raised by a settlement, but it is also vested with considerable discretion. In re Resorts International Shareholders Litigation Appeals, supra; Barkan v. Amsted Industries Inc., supra.

In this case there can be no question that the Court Below fulfilled its duty to probe. In its July 19, 1989 decision denying the preliminary injunction application in the Kahn action, the Court Below expressed its displeasure with the manner in which it perceived the settlement negotiations in this action to be progressing and listed six "troublesome" issues which would have to be addressed if any settlement of the litigation was to be approved. A-381. The result was that all of those issues were addressed at the settlement hearing<sup>7</sup> to the satisfaction of the Court Below as evidenced by its approval of the settlement.

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<sup>7</sup>See Memorandum Of Occidental And Individual Defendants In Support of Settlement, B-826 to B-836.

Moreover, the Court Below clearly considered the nature and strength of the plaintiffs' claims and the possible defenses thereto. Indeed it was the weakness of the plaintiffs' claims measured by established case precedent that convinced the Court Below that what it found to be meager consideration was sufficient under the facts and circumstances to support the settlement. A-497. See also Barkan v. Amsted Industries, Inc., supra. Finally, the Court Below obviously applied its business judgment in approving the settlement in light of its personal observation that if it had been a director of Occidental it might vote against the museum project. A-506.

What is also significant is that in the process of preparing for the presentation of their objections to the settlement the Objectors Below were permitted an unusual amount of discovery. Documents were produced to them. They took the depositions of Dr. Hammer, A-82, and Daniel N. Belin, A-281, of LACMA. They also deposed Senator Albert Gore, Sr., A-178, the acting chairman of the Special Committee; Ronald Asquith, A-472, Vice President of Occidental with the responsibility for overseeing the construction of the parking garage and art museum facilities; and Hillary Gibson, D.E. 121, (A-5) the Director of Development of the Museum responsible for raising funds for its continuing public support. They twice deposed William Prickett, Esquire, counsel for the plaintiffs once in this, the

Sullivan action, D.E. 95 (A-4) and once in the Kahn action, B-25. Moreover, the Objectors Kahn and Stepak have had the opportunity twice (and CalPERS once) to brief and argue to the Court Below their opposition to the settlement. Yet with all of this, the Objectors Below can do no better than to argue on this appeal that the Special Committee was not adequately informed in approving Occidental's charitable contribution and that consequently the Court Below erred in its conclusion that the business judgment rule "stands as an almost impenetrable barrier to the plaintiffs." A-508. However, the facts of record show otherwise and measured by the standard of Levitt v. Bouvier, supra, and its progeny, the Court Below's analysis of the likely applicability of the business judgment rule is clearly correct.

To begin with, the members of the Special Committee are both independent and disinterested. All are successful business persons in their own right. Of the eight, four (Gore, Nizer, Krim and Syriani) are also attorneys. They are familiar with the business and affairs of Occidental. Collectively, they have more than 80 years experience on Occidental's board of directors. A-433; A-338 to A-341. None of them has any direct personal or financial interest in the Art Collection, the Museum or the art museum project, and none is charged with any deliberate wrongdoing. Their approval of the charitable contribution in no way insures their continuation in office as directors of Occidental.

There is nothing in the record to even remotely indicate that any of them are dominated or controlled by Dr. Hammer or anyone else associated with either the Museum or the Foundation. Nor do the Objectors Below make such a contention. The finding of the Court Below that the Special Committee was composed of independent and disinterested directors is clearly logical and is supported by the record. A-509.

As to the knowledge of Occidental's board in general, and the Special Committee in particular, of the available information material to the proposed charitable contribution, the factual record is overwhelming. As indicated previously, Dr. Hammer's idea of leaving the Art Collection in a way to benefit Occidental as well as the public was first made known to the Executive Committee of Occidental's board on January 19, 1988.<sup>8</sup> A-164; A-334. The Executive Committee authorized preliminary negotiations with respect to the project, and the full board approved that action on February 11, 1988. A-334 to A-335; A-354 to A-355. The full board considered the matter again at a regular meeting on November 10, 1988. A-335; B-111 to B-113. A general proposal for the art museum project was presented to the full board on December 15, 1988 and was considered. A-335; A-336; A-348 to A-353. At that meeting the board received the advice and opinion of outside counsel.

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<sup>8</sup>Special Committee members Tomich and Piper were also members of the Executive Committee.

The Dilworth firm subsequently prepared a 96-page legal memorandum dealing with all aspects of the proposed charitable donation. B-115 to B-253. This memorandum was received by all directors prior to the next meeting of the board on February 16, 1989. A-336; A-337; B-60; B-61. At that meeting a written proposal for the museum project was considered and the Special Committee was appointed and designated to make the decision as to whether and on what conditions Occidental would accept Dr. Hammer's proposal and fund the charitable contribution. A-337 to A-338; B-283 to B-285. The Special Committee then met and, with the benefit of all information previously obtained, including the Dilworth memorandum, discussed the proposal in detail<sup>9</sup> with the assistance of representatives of the Dilworth firm, representatives of the firm of Skadden, Arps as counsel for the Museum, and representatives of Arthur Andersen & Co., the outside accountants for Occidental. A-340 to A-341; B-299; B-300.

As a result, the Special Committee determined to approve the funding of the art museum project by Occidental, but subject to the satisfaction of certain conditions with respect to the Museum and subject also to the authorization by Occidental's full board of the expenditure of the funds needed for the construction of both the parking garage and

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<sup>9</sup>See the minutes of that meeting of the Special Committee for the extent of the matters discussed and considered. B-299 to B-319.

the museum building. A-341 to A-342; B-286; B-287; B-309 to B-311. Thereafter, the Special Committee met again on July 20, 1989, satisfied itself that all of the previously imposed conditions had been fulfilled and approved Occidental's funding of the project. A-493(c). Copies of all documents and opinion letters required for the satisfaction of the conditions were sent to the members of the Special Committee in advance of that meeting. A-493(b) to A-493(c).

Because the Court Below had expressed its concern in its July 19, 1989 decision in the Kahn action that the Special Committee had not retained independent counsel, the Special Committee proceeded to retain separate Delaware counsel. A-493(d). It subsequently met with its independently-retained Delaware attorneys by telephone on August 14 and in Los Angeles on September 20, 1989. A-493(d); A-493(e). It reviewed its previous actions with its separate counsel, and confirmed its decision to approve the charitable donation. A-493(e); A-397.

Thereafter, the Special Committee was further empowered by Occidental's board to determine whether or not the settlement proposed by the plaintiffs should be accepted. A-493(f). Accordingly, it caused the proposed settlement documents to be analyzed and abstracted by its counsel, and at a meeting on November 16, 1989, it unanimously recommended that the settlement be accepted and presented to the Court Below. A-493(f); A-493(g). Still later, the Special

Committee met again on March 29, 1990 to assure itself that the terms of the proposed settlement were being adhered to even prior to its presentation to the Court Below. A-493(g); A-493(h); A-493(i).

In summary, the members of the Special Committee, either in that capacity or as members of Occidental's board, met on six separate occasions during the period between December 15, 1988 and November 16, 1989 to discuss and consider Occidental's funding of the art museum proposal. By virtue of their service on the board, they were familiar with Occidental's business and financial condition and the economic benefit Occidental had derived from its prior association with Dr. Hammer's art collection. They had the benefit of a comprehensive memorandum on the legal and tax aspects of the proposal. They questioned the attorneys for Dr. Hammer, the attorneys for the Museum and the outside accountants for the company. They required certain conditions to be met to assure the tax-exempt and penalty-free consequences of the proposal. They reviewed, revised and then approved the terms of the documents that would be used to bind the transaction. And they reviewed their actions and decision as the Special Committee with their separate counsel. All of these factors are established in detail in the record before the Court Below and were presented and

argued to it.<sup>10</sup> Clearly, there was ample basis for the Court Below to conclude that upon any final determination it was "highly probable" that it would find that the decision challenged by the plaintiffs was indeed an informed one made by an independent, disinterested committee of Occidental's board and that as a consequence it was likely that the presumption of the business judgment rule would bar any recovery by the plaintiffs if the settlement was not approved.

Having nothing significant with which to work, the Objectors Below, in a blatant attempt to stretch the facts of this case so as to fit it under this Court's decision in Smith v. Van Gorkom, Del.Supr., 488 A.2d 858 (1985), have purported to catalogue various matters as to which the Special Committee was supposedly unaware, and thus uninformed, in an effort to establish that the Court Below abused its discretion in its reasoning that the Special Committee's decision would likely be afforded the protection of the business judgment rule. The effort, however, does not withstand scrutiny.

To begin with, of the twenty separate matters as to which the Objector Kahn charges the Special Committee with being unaware (Kahn Br. at 10-13), seventeen have been

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<sup>10</sup>See Memorandum Of The Special Committee Of The Board Of Directors Of Occidental Petroleum Corporation In Support Of The Proposed Settlement at B-780 to B-797 and Transcript of Settlement Hearing at B-863 to B-882.

selectively crafted solely from the deposition testimony of the defendant Senator Albert Gore. All of the contentions of CalPERS' on this point are supposedly supported by reference to the deposition of Senator Gore. (CalPERS Br. at 12, 13, 20, 21.) The insinuation is that Senator Gore's knowledge and recollection at his deposition is that of the entire Special Committee.

There are two things wrong with this. First, Senator Gore, then 82 years of age, is only one member of the Special Committee. His recollection at a lengthy deposition of matters that transpired many months before does not reflect his understanding at the time of the transaction or that of any of the other seven members of the Special Committee, none of whom -- purposely it is suggested -- were thereafter deposed. Secondly, Senator Gore's deposition was taken on June 27, 1989. The Special Committee did not meet further to discuss the art museum project and to give its final approval of it until July 20, 1989. Thus, the argument of the Objectors Below, based virtually entirely on the deposition of Senator Gore that the Special Committee was uninformed when it gave its approval for the charitable contribution by Occidental, is unsupported by the very portions of the record on which the Objectors Below rely. Quite simply, the final decision had not been made at the time of Senator Gore's deposition.

Similarly, the argument of the Objectors Below that the construction of the museum project was approved unconditionally by the Special Committee at its initial meeting on February 16, 1989 is also unsupported by the record. The minutes of that meeting are unequivocal. Dr. Hammer's proposal was approved "conditioned upon" incorporation of the Museum as a non-profit corporation, approval of its tax-exempt status by the Internal Revenue Service, opinion letters from counsel that the funding of the Museum by Occidental would not incur self-dealing penalties under the Internal Revenue Code, and the approval by the Special Committee of appropriate documents relating to the lease and option for the proposed 30-year leasehold term and the transfer of the art collection. What the Objectors Below choose to overlook is that the \$50 million expenditure authorized on that same date was for two things: \$27 million was authorized for the construction of the proposed museum building and \$23 million was authorized for the construction of a five-story, subterranean parking garage to be located below the proposed museum building to accommodate parking for 689 motor vehicles. A-246; A-247. The parking garage is not being leased to the Museum under the proposal approved by the Special Committee. A-242. It was and is for Occidental's use. Thus, the fact that a "huge hole, visible to all, was excavated" on Occidental's property before the Special Committee met to approve the charitable contribution (Kahn

Br. at 18) on July 20, 1989 does not mean that Occidental was committed on February 16, 1989 either to the construction of the museum building aboveground at that site or to the financial support of the Museum for the next 30 years as the Objectors Below insinuate.

This circumstance disposes of other charges of the Objectors Below as well. Since the Special Committee was not contractually committed to make the proposed charitable donation to construct and fund the art museum following its conditional approval of the project on February 16, 1989, the attempt to analogize the facts of this case with those of Smith v. Van Gorkom, supra, on this basis (Kahn Br. at 19) fails also. For the same reason, neither the Special Committee nor the board of directors breached any duty they may have had to "monitor the Hammer Museum project" (Kahn Br. at 18) prior to July 20, 1989, nor were the members of the Special Committee "interested" when they gave their approval to the project on that date because they had exposed themselves to potential personal liability by permitting construction of the museum to proceed without authorization. (Kahn Br. at 19.) If, for instance, the Special Committee had determined after February 16 to abort Occidental's proposed support of the Museum because it would have resulted in substantial self-dealing penalties under the tax laws, its members would not have been personally liable for expenditures improperly made by others on the assumption that the

project would be approved in total. However, the Special Committee's eventual informed decision to go forward with the project renders further consideration of the subject moot.

Otherwise, the Objectors Below insinuate that the Special Committee was uninformed because it relied initially on legal advice provided by the Dilworth firm which, at the time, was representing Dr. Hammer on a personal matter, and because the estimate of the value of Occidental's headquarters property at \$55 million 30 years in the future was provided by an appraisal firm selected by Dr. Hammer.<sup>11</sup> However, with one exception dealt with hereafter in Argument II, the Objectors Below do not contend that anything contained in the Dilworth firm's 96-page memorandum to Occidental's directors was inaccurate or that the Dilworth firm misled the Special Committee in any way. Nor is there anything in the record to indicate that the 30-year projected estimate of the value of Occidental's headquarters property relied upon by the Special Committee was either inaccurate or unworthy of its consideration.

Finally, the Objector Kahn apparently suggests that the Special Committee was uninformed because at its meeting on July 20, 1989 it approved without explanation the purchase of a \$39 million annuity to fund support for the Museum over

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<sup>11</sup>The record indicates that Dr. Hammer had no prior dealings with the appraisal firm and that he secured its services for Occidental based upon the recommendation of a business acquaintance with vast experience in commercial land development. A-114; A-115.

the next 30 years after having conditionally approved the purchase of a \$36 million annuity for this purpose at its meeting on February 16. (Kahn Br. at 14.) However, even CalPERS recognizes that the cost of the annuity was only "estimated" to be \$35.6 million in Dr. Hammer's proposal that was approved conditionally by the Special Committee on February 16. (CalPERS Br. at 10; A-243.) Moreover, the purpose of the annuity was to provide certain levels of annual support for the Museum, i.e., \$5 million per year for the first two years, \$4 million per year for the next two; \$3 million for the fifth and sixth years; and \$2.5 million for each of the 24 years thereafter, and with a \$55 million lump sum payment at the end of the 30th year. A-243. It is not surprising to think that changing market conditions between February and July 1989 could have increased the cost of such an annuity from an "estimated" \$35.6 million to \$39 million.

In short, the arguments of the Objectors Below are both superficial and meritless. It is unrealistic to think that they could serve to sustain a finding of gross negligence on the part of the Special Committee. See, Aronson v. Lewis, Del.Supr., 473 A.2d 805, 812 (1984). The record clearly supports the finding of the Court Below that upon a final determination on the merits, the decision of the Special Committee would likely be held to be an informed one entitled to the protection of the presumption of the business

judgment rule. In this respect the Court Below did not abuse its discretion.

**II. IN APPROVING THE SETTLEMENT THE COURT BELOW DID NOT ABUSE ITS DISCRETION BY CONSIDERING THE CHARITABLE GIFT BY OCCIDENTAL TO BE WITHIN THE RANGE OF REASONABLENESS**

**A. Standard And Scope Of Review**

The standard and scope of review for this issue is the same as that set forth previously in Argument I.A.

**B. The Merits Of The Argument**

In approving the settlement, the Court Below found that "[f]rom the present record it is also clear that the present gift (as now limited) is within the range of reasonableness" and that "[i]t is therefore reasonably probable that plaintiffs would also fail to prevail on this claim." A-511. That conclusion is supported by the record and existing case precedent. The decision of the Court Below should be affirmed.

In attacking this determination, the Objectors Below make essentially two arguments: (1) there was no need for Occidental to fund the construction and support of the Museum because Dr. Hammer could have, and should have, left his art collection to LACMA (Kahn Br. at 23-29; CalPERS Br. at 27-28) and (2) the cost to Occidental for its construction and support of the Museum is unreasonable in amount (Kahn Br.

at 29-32; CalPERS Br. at 25-27). These arguments provide no basis for rejecting the business judgment of the Court Below.

Throughout this matter both Kahn and CalPERS have acted openly as surrogates for LACMA. They have praised LACMA as a prominent national art museum, which undoubtedly it is, and they have argued that the Art Collection could be more effectively displayed if left to LACMA. They have assailed Dr. Hammer personally for "reneging" on his announced intention to leave the collection to LACMA and they have argued that his decision has caused injury to LACMA and created ill will for Occidental in the process. They argue that there was no need for Occidental to fund the construction of a separate museum to house the Art Collection since ample facilities already existed at LACMA for this purpose and because, supposedly, LACMA was eventually willing to assume the responsibility for maintaining the Collection on essentially the terms and conditions that Dr. Hammer demanded. From this they would have it concluded that Occidental's charitable gift to fund the Museum was unnecessary, and thus a waste of corporate assets. This contention, however, overlooks several factors.

First, regardless of who may have been right or wrong in the dispute that developed between LACMA and Dr. Hammer, the result is that the art is not going to LACMA. That decision was made by the owners of the Art Collection and neither Occidental nor the Special Committee could

change it. That decision did, however, present Occidental with an opportunity which the Special Committee, in the exercise of its business judgment, deemed to be in the best interests of the corporation to take. This highlights the other indisputable facts of record which the Objectors Below choose to ignore.

The Art Collection is a unique asset having a value of between \$300-\$400 million.<sup>12</sup> B-88; B-428. There is only one of its kind in the world. Moreover, it has been associated with Occidental over the years, has been instrumental in establishing good will for Occidental both in this country and abroad, and has aided in obtaining numerous contracts and other economic advantages for the corporation.<sup>13</sup> Now it will become openly associated with Occidental for at least the next 30 years in a modern, professionally maintained public museum located across the courtyard from Occidental's executive offices, thereby serving to enhance Occidental's reputation as a patron of the arts and education and continuing for its benefit the goodwill that it has already derived from its past association with the Art Collection.

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<sup>12</sup>The value of the art collection is not referred to even once in the combined 69 pages of briefing by the Objectors Below.

<sup>13</sup>These undisputed facts are also not mentioned at all in the combined 69 pages of briefing by the Objectors Below.

Accordingly, there was a need to provide a home for the Art Collection if the public in general, and the Los Angeles community in particular, were to be assured of its future availability, and there is a reasonable and demonstrated business-related purpose in having Occidental make the charitable contribution to accomplish this goal. Why Dr. Hammer and the Foundation came to make this opportunity available to Occidental, and whether in good conscience they should have done so, has nothing to do with the propriety of the business decision made by the Special Committee once the opportunity presented itself. This distinction was not lost on the Court Below.

Further, gifts by Delaware corporations for charitable and educational purposes are expressly authorized by 8 Del.C. §122(9). The management of the business and affairs of a Delaware corporation is vested in its board of directors, 8 Del.C. §141(a), and since business decisions can be delegated to committees of the board of directors, 8 Del.C. §141(c), the Special Committee's decision was presumptively a valid act of business judgment inasmuch as there is ample record support for the conclusion that its members were independent and disinterested and "acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." Aronson v. Lewis, supra.

Moreover, 8 Del.C. §122(9) places no limitations on the size of a corporate charitable gift. Accordingly, it has been construed "to authorize any reasonable corporate gift of a charitable or educational nature." Theodora Holding Corporation v. Henderson, Del.Ch., 257 A.2d 398, 405 (1969). The test to be applied "is that of reasonableness, a test in which the provisions of the Internal Revenue Code pertaining to charitable gifts by corporations furnish a helpful guide." Id. Occidental's charitable gift in support of the Museum meets that test.

Under current tax law a corporation is permitted to deduct charitable contributions of up to 10% of its taxable income (up from the 5% permitted at the time of Theodora). For purposes of this deduction the gift here is the \$39 million cost of the annuity. It is not \$96 million as argued by the Objectors Below. This is because the museum building and the parking garage are not being donated at this time. They remain the assets of Occidental, subject to the Museum's 30-year lease of the museum building -- but not the parking garage. Those assets will pass to the Museum only if the option is exercised at the end of the 30-year lease term. Accordingly, it is only at that time, if at all, that they can be considered a charitable donation for tax purposes, and even this has contingencies since Occidental will get back 50% of any amount over \$55 million for which the property may be sold after the exercise of the option. Even

if the \$60 million cost of construction were to be treated as a gift, it can be argued that it could be amortized over the 30-year term of the lease-option, i.e., \$2 million per year. This is again because the assets will still be owned by Occidental. Clearly the \$60 million in construction costs, unlike the annuity, cannot be accounted for as a current gift to the Museum.<sup>14</sup>

The cost of the annuity is less than 7% of Occidental's net income. Thus, the charitable contribution in the year it was made is less than 10% of Occidental's taxable income, not 16% as argued by the Objectors Below, and thus it is reasonable when measured by the "helpful guide" of the Internal Revenue Code provisions approved in Theodora.

In addition, the gift found to be reasonable in Theodora was less than one-half of one percent of the net asset value of the corporation (\$528,000 versus \$150 million = .0035). Even if the erroneous \$96 million figure argued by the Objectors Below is used for the amount of the gift, it represents less than one-half of one percent of the \$20.5 billion net asset value of Occidental. Also, the gift was found reasonable in Theodora even though it was more than 50% of the nearly \$1 million of dividends paid by the company in

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<sup>14</sup>The Objector Kahn, in his only specific disagreement with any aspect of the Dilworth firm's 96-page memorandum to the Special Committee members, charges that it "inexplicably ignores" the construction costs as part of the gift and uses only the cost of the annuity for its comparisons (Kahn Br. at 32, fn. 25). The analysis of the Dilworth firm, however, is the correct one.

the same year. That is not the case here. Moreover, the Objectors Below fail to acknowledge that in return for the rent-free lease of the museum building, the Museum will bear the cost (except property taxes) of operating the facility (including the space on the first four floors of Occidental's headquarters building) estimated to be about \$2.5 million per year. Thus, no cash outlay will be required from Occidental for this purpose over the next 30 years other than property taxes (which may arguably be reduced because of the use of the premises by a tax-exempt entity).

CalPER's quibbling about additional costs that should have been allocated to the museum project by Occidental (CalPERS Br. at 25-26) and Kahn's speculation as to how much of the annuity may be deducted as a charitable donation in what year (Kahn Br. at 31) reflect nothing more than a difference of opinion between Occidental's board of directors and two of its 495,000 shareholders. Nor is Kahn's charge that Occidental has been "caused to spend over \$160 million to divert the Collection from a superior facility, solely to assuage Hammer's bruised ego" (Kahn Br. at 27) either accurate or supported by the record.

What is substantiated by the record are facts from which the Court Below could readily find at a final hearing that the comparatively small cost to Occidental to guarantee an additional 30-year association with the Art Collection

"... is far out-weighed by the overall benefits flowing from the placing of such

gift in channels where it serves to benefit those in need of philanthropic or educational support, thus providing justification for large private holdings, thereby benefiting [the stockholders] in the long run."

Theodora Holding Corporation v. Henderson, supra, at 257 A.2d 405. The Court Below did not abuse its discretion by perceiving Occidental's charitable donation to be reasonable.

**III. THE COURT BELOW DID NOT ABUSE ITS DISCRETION IN FINDING THE CONSIDERATION FOR THE SETTLEMENT TO BE ADEQUATE TO SUPPORT A DISMISSAL OF THE LITIGATION**

**A. Standard and Scope Of Review**

The standard and scope of review for this issue is the same as that set forth previously in Argument I.A.

**B. The Merits Of The Argument**

The Court Below found the consideration for the settlement to be "meager". A-497. Nonetheless, the terms of the settlement did add some benefit to the transaction from Occidental's standpoint over and above the terms and conditions that were being considered by the Special Committee at the time that the several shareholder suits were filed.<sup>15</sup> Because the Court Below properly found on the

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<sup>15</sup>The suits in the Court Below were filed in May and June of 1989 prior to the decision of the Special Committee on July 20, 1989 to approve the charitable contribution. Significantly, none of the shareholder plaintiffs sought injunctive relief to stop the publicly announced proposal from going forward (as contrasted with the effort in the Kahn action to enjoin settlement negotiations in this action), thus hinting in advance at the weakness of the plaintiffs' claims as found by the Court Below.

record that "the possibility of success, when suit was filed (as plaintiffs now concede) was weak", D.E. 77 (A-7), the additional benefits that can arguably be credited to the settlement, i.e., requiring the placement of Occidental's name on the museum building itself, requiring the Museum to recognize Occidental's contribution in public references to the facility, assuring Occidental of ongoing representation on the Museum's board of directors, placing limitations of Occidental's future contributions to Hammer related charities, limiting Occidental's contribution to the cost of construction for the parking garage and museum facility to a maximum of \$60 million and assuring Occidental of a future right to share 50% of any amount realized over \$55 million in the event the option to purchase its headquarters property is exercised by the Museum 30 years from now and the property is thereafter resold, A-504 to A-505; A-512, provided sufficient consideration to support the settlement even if not subject to precise quantification. As this Court has held in Barkan v. Amsted Industries, Inc., supra, at 567 A.2d 1285:

"The strength of claims raised in a class action lawsuit helps to determine whether the consideration received for their settlement is adequate and whether dismissal with prejudice is appropriate. Thus, if the Chancellor were to find that the plaintiff class was being asked to sacrifice a facially credible claim for a small consideration, he would be justified in rejecting a settlement as unfair. Conversely, where the Chancellor finds that the plaintiff's potential challenges have little chance of success


he has good reason to approve the proposed settlement." (Emphasis added.)

Applying the rationale, the Court Below did not abuse its discretion in finding the settlement consideration to be adequate.

**CONCLUSION**

For the reasons set forth herein the appellees Arthur Krim, Aziz D. Syriani, Senator Albert Gore, John W. Kluge, Louis Nizer, George O. Nolley, Dr. C. Erwin Piper and Rosemary Tomich, respectfully pray that the decision and order of the Court Below be affirmed.

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(Constituting the Special Committee  
of Occidental's Board of Directors)

November 21, 1990

CERTIFICATE OF SERVICE

I, Grover C. Brown, hereby certify that two copies of the attached Answering Brief of Appellees Arthur B. Krim, Aziz D. Syriani, Senator Albert Gore, John Kluge, Louis Nizer, George O. Nolley, Dr. C. Erwin Piper and Rosemary Tomich together with two copies of Volumes I and II of the Joint Appendix Of Appellees Joseph Sullivan and Alan Brody And The Special Committee Of Occidental's Board Of Directors To Their Answering Briefs were hand-delivered this 21st day of November, 1990 to the following counsel of record at the addresses indicated:

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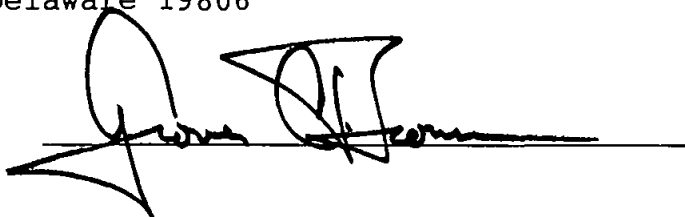
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A handwritten signature in black ink, appearing to read "Grover C. Brown", is written over a horizontal line. The signature is stylized and cursive.