

c: ADC, HNH, RGH  
DELAWARE SUPREME COURT  
FILED

90 DEC 18 PM 4:26

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEPUTY CLERK  
Wilmington

ALAN R. KAHN,	)	
	)	
Appellant,	)	No. 301,1990
Objector-Below,	)	
	)	ON APPEAL FROM THE
v.	)	COURT OF CHANCERY
	)	IN AND FOR NEW
JOSEPH SULLIVAN, et al.,	)	CASTLE COUNTY
	)	C.A. No. 10823
Plaintiffs-Below	)	
Defendants-Below	)	
Intervenor Defendants,	)	
Appelles.	)	
	)	

REPLY BRIEF OF OBJECTOR BELOW-APPELLANT ALAN R. KAHN

BIGGS AND BATTAGLIA  
1206 Mellon Bank Center  
P.O. Box 1489  
Wilmington, DE 19899  
(302) 655-9677

Counsel for Objector  
Below-Appellant

Of Counsel:

SILVERMAN, HARNES & OBSTFELD  
International Plaza  
750 Lexington Avenue - 14th Floor  
New York, NY 10022  
(212) 754-2333

Dated: December 18, 1990

TABLE OF CONTENTS

	<u>Page</u>
Table Of Authorities .....	iii
INTRODUCTION .....	1
ARGUMENT	
I	
THE RECORD DOES NOT SUPPORT THE APPELLEES' CONTENTION THAT IN APPROVING THE CHALLENGED GIFT, OCCIDENTAL'S BOARD WAS FULLY INFORMED .....	1
A. The Special Committee Did Not Act In An Independent Manner .....	1
B. The Record Demonstrates That The Special Committee And The Board Were Uninformed And Misled .....	3
1. Although The Board Met, Its Members Were Not Informed .....	4
II	
THE RECORD ESTABLISHES THAT THE ISSUES WHICH THE COURT BELOW COMPLAINED OF IN ITS PRIOR DECISION WERE NOT RESOLVED BY THE SETTLEMENT WHICH THE COURT APPROVED .....	15
III	
APPELLEES HAVE FAILED TO SHOW THAT THE CONTRIBUTION WAS REASONABLE .....	18
1. The Museum Constitutes Waste, Since It Replaces An Appropriate Existing Facility Funded By Occidental, Which Was Scuttled By Hammer On Personal Grounds .....	19

	<u>Page</u>
2. The Amount Of The Contribution Does Not Meet The <u>Theodora</u> Test .....	20
IV	
THE SETTLEMENT IS INADEQUATE .....	23
1. The Nature And Extent Of The Benefit Accruing To Occidental From Naming The Museum After It .....	23
2. Minority Representation On The Museum's Board .....	27
3. Limitations On Future Contributions To Charities Bearing Hammer's Name .....	28
4. The Agreement To Transfer The Art .....	29
5. Ceiling On The Cost Of Construction Of The Museum .....	29
6. Occidental's Right To Share In Future Profits Realized By The Museum .....	30
CONCLUSION .....	33

TABLE OF AUTHORITIES

Page

CASES

<u>Theodora Holding Corporation v. Henderson,</u> Del. Ch., 257 A.2d 398 (1969) .....	18, 22
.....	23

REPLY BRIEF OF OBJECTOR BELOW-APPELLANT ALAN R. KAHN

INTRODUCTION

Objector Alan R. Kahn ("Objector") submits this brief in reply to the answering briefs of both the Special Committee defendants (the "defendants") and the settling plaintiffs (the "plaintiffs").

ARGUMENT

I

THE RECORD DOES NOT SUPPORT THE  
APPELLEES' CONTENTION THAT IN  
APPROVING THE CHALLENGED GIFT,  
OCCIDENTAL'S BOARD WAS FULLY INFORMED

In arguing that if the settlement were not approved, Objector's action would be thwarted by the business judgment rule, the appellees contend that the "facts of record" establish that the Special Committee was independent, disinterested and fully informed. Objector submits that the record does not support the appellees' contention. On the contrary, the record demonstrates that the Board's approval was of such a nature as to deny its members the protection of the business judgment rule.

A. The Special Committee Did Not  
Act In An Independent Manner.

The record reflects that Hammer exerted absolute control over Occidental's affairs. Indeed, Hammer was so certain that his "own" museum would be paid for by Occidental, that before the proposal for that facility was

ever broached to Occidental's board, Daniel Belin, Esq. was informed by Hammer that he had made "alternative arrangements" for the permanent display of his art. Hammer stated with respect to the Collections: "I have decided to create my own museum to house them." (A330(a). Emphasis added.)

Hammer added that although (on January 8th) he "was still in the process of working out the myriad details" of his new museum, its physical composition and operation had already been determined by him. (A330(a)).

After Hammer's museum proposal was presented to Occidental's Board, neither it, nor the Special Committee which it appointed, exhibited even a hint of independence in considering the project. The Committee used as its legal advisor, an attorney recommended by Hammer (A105(a)), who had served as his personal counsel. The Committee retained no independent advisors, and accepted a single appraisal of Occidental's headquarters, made by an appraiser recommended by Hammer (A114-115), without any investigation as to the reliability and judgment of such appraiser or as to whether his opinion was justified.

At least four members of the Special Committee had close ties to Hammer and personal business dealings with him.<sup>1</sup> Senator Gore had been an Occidental employee for many

---

1. Objector requests that the Court take judicial notice of Occidental's proxy statement for its 1989 Annual Meeting,

years. (A609). Louis Nizer is a member of a law firm which derives a substantial percentage of its annual income from Occidental (A610-611), and Arthur Krim was a partner and is now counsel to that firm. (A608, 611). George O. Nolley was the founder of the Permian Corporation which was purchased by Occidental. (A610).

Moreover, even if it be conceded arguendo, that the Special Committee acted in an independent manner, the record reflects that the Committee's approval of the museum proposal was not fully informed.

B. The Record Demonstrates That  
The Special Committee And The  
Board Were Uninformed And Misled.

The defendants assert that the record is "overwhelming" with respect to their knowledge of "the available information material to the proposed charitable contribution." Plaintiffs make the more modest claim that the record contains evidence that the directors' decisions were informed. However, nowhere in their briefs, do the appellees discuss in any detail, what the directors knew and when they knew it.<sup>2</sup> On the contrary, the essence of

---

dated April 25, 1989, a copy of which was filed with the Securities and Exchange Commission.

2. Appellees gloss over Objector's demonstration that at his deposition, the Special Committee's chairman, Senator Gore, displayed a failure to comprehend even the most basic aspects of the challenged gift. The defendants suggest that Senator Gore, "then 82 years of age", should not have been expected to recollect highly important corporate "matters" between board meetings. (Part of the museum proposal was approved on February 11, 1989, and the remainder on July 20, 1989. Senator Gore's deposition was held on June 27, 1989.)

appellees' argument appears to be that the Special Committee met, ergo, it must have known. That argument, however, does not survive close scrutiny of the various meetings at which the museum proposal was discussed. Such scrutiny reveals that the Special Committee, as well as the Board, was fed information with respect to the museum proposal in a cursory, confused and piece-meal fashion. Only at the meeting held on February 11, 1989, was the board informed of the full extent of Hammer's proposal. However, at that meeting, Hammer's personal attorney furnished the directors with a memorandum of law which contained distorted and erroneous material, designed to effect his client's plan. At no time, was the Board given the full picture in a clear and unbiased way, and accordingly, its approval of the museum lacked an adequate foundation.

1. Although The Board Met, Its Members Were Not Informed.

The various meetings at which the museum proposal was considered by Occidental's board are listed by the defendants in their brief. The initial meeting, at which Hammer first proposed his museum to the Executive Committee, was held on January 19, 1988. At that meeting, the financing of the museum was not discussed, and no estimate of its cost was given to the Executive Committee. Nevertheless, the Committee authorized "the negotiation of arrangements for the design and construction" of the museum building. (A167).

On February 11, 1988, the full board was read the minutes of the Executive Committee meeting of January 19, and without "further comment", expressed approval of the action taken by the Executive Committee. (A355).

The full board considered the matter again on November 10, 1988. At that meeting, although the Board had not approved the museum (and there is no evidence that it knew its cost), the board approved a \$30 million performance and payment bond in connection with the museum's construction. (A112).

The first meeting at which the board would appear to have been given some clue as to the cost of the museum, was a meeting of the full board on December 15, 1988. At that meeting, Hammer proposed that Occidental "help support" the museum, and a cursory, two page opinion letter from the law firm of Dilworth, Paxson, Kalish and Kauffman (the "Dilworth firm") was read to the Board. (A352-353). The Board was informed that the total cost of the museum construction was expected to reach \$50 million. In addition, it was proposed to the Board that Occidental agree to make up any difference between the museum's income and \$2.5 million per year for 15 years. The shortfall was not estimated, and no annuity was mentioned. (A350-351). At that meeting, the museum was approved, subject to the preparation of a "position memorandum examining the tax, legal, economic and other ramifications", and subject to the

Board's examination of the memorandum. (A349). In short, the museum proposal was approved by the Board, subject to the future examination of the proposal by the Board.

The museum proposal was next considered by the Board on February 16, 1989. As noted, in preparation for that meeting, the Board had been provided with a memorandum prepared by the Dilworth firm. (B115-253). The memorandum, which contained a written statement of the proposal, introduced the annuity (then in the amount of \$33.5 million) for the first time. (B119). The cost of construction was estimated at \$50 million, of which "approximately 23 million" was described as the cost of a parking garage for Occidental's "commercial use." (B118). A Special Committee was appointed to consider the proposal. (B284).

The meeting of the Board was adjourned, to reconvene after the meeting of the Special Committee. The Special Committee then met and reviewed a written museum proposal (B313-317).

The Special Committee discussed and approved the proposal, conditioned inter alia, upon the incorporation of the museum as a non-profit corporation and the determination by IRS that the museum was tax exempt. (B309). However, despite the conditional nature of its approval, the Special Committee ordered that construction of the museum be continued and completed.

Following the Special Committee meeting, the full board reconvened and the Special Committee reported its action. That Committee was then requested to authorize expenditures for museum construction ("AFE's"). (B286). The Special Committee reconvened, approved the AFE's requested in the amount of \$50 million, and amended its prior resolution to reflect such approval. The Board thereafter approved the Special Committee's amended resolution (B293) authorizing the expenditure of \$50 million for construction of the museum. Thus, on February 11, only the annuity awaited Board approval.

The Special Committee next met on July 20, 1989. At that meeting, the Committee examined certain documents and determined that the conditions imposed at the February 11th meeting had been met. Upon such determination, the proposal was finally approved, and the execution of the lease and purchase of the annuity were authorized. (A493(c)). Having completed its approval of the charitable contribution, the Committee then determined to retain "independent Delaware counsel." (A493(e)).

The Committee met with its independent Delaware counsel on September 20, 1989. At the September meeting, the Committee members discussed with their new counsel "why" they had approved the museum project. Such counsel then discussed with the Committee, its role and the Delaware business judgment rule. (A493(e)). As noted in Objector's

opening brief, the Committee was obviously seeking Delaware counsel's view as to the Committee's possible liability in the pending litigation.

As the above summary and the record upon which it is based make plain, the only meeting at which any meaningful consideration of the challenged contribution was had, was the meeting held on February 11, 1989. However, prior to that meeting, the Board had been presented with the opinion and memorandum of the Dilworth firm, and at the meeting, Bruce Kauffman, Esq., Hammer's personal attorney, discussed the contribution with the Board. In their briefs, the appellees assert that with one exception, the Objector does not contend that anything contained in the Dilworth firm's memorandum to Occidental's directors was inaccurate, or that the Dilworth firm misled the Special Committee in any way. That assertion misstates Objector's position. Objector contends that the Dilworth memorandum was heavily affected by that firm's conflict of interest, and as a result, was tantamount to a selling document for the museum. The memorandum, which anticipated little or no shareholder displeasure and unanimous community praise, consistently presented the project in the most flattering and advantageous light. In addition, it virtually assured the directors of freedom from liability under the business judgment rule if they approved the proposal.

Moreover, Objector's "one" exception recognized by appellees is a monumental one. The most misleading aspect of the Dilworth memorandum (discussed in Objector's opening brief) is the use throughout, of \$33.5 million as the amount of Occidental's gift to the museum. Thus, for example, when Occidental's contribution is compared in the Dilworth memorandum with contributions made by other corporations, only the cost of the annuity is used. (B147, 152). Since the annuity is approximately one-third of the cost of the overall project (excluding the \$55 million cost of purchasing the Kirkeby building), the comparison is grossly misleading.

The defendants defend the Dilworth memorandum, using the same capricious arguments which the Dilworth firm used in its memorandum, to excise the new museum building and parking garage, as well as the renovated portion of the headquarters building, from the corporate gift. Thus, the defendants argue, since the gift was structured so as to deprive Occidental of a tax deduction for the museum and garage, they do not constitute a gift. In effect, defendants argue, that portion of the gift which is not currently tax deductible is not a gift.

That the museum and garage constitute a gift in economic terms, is, Objector submits, beyond dispute. Occidental has currently expended at least \$60 million in order to give the museum a rent free, thirty year lease on

the newly constructed museum building and the renovated first four floors of Occidental's headquarters, an option to purchase the entire complex (including the remainder of the headquarters building) after the expiration of the lease, and the funds to make the purchase. In addition, Occidental has made a gift of more than the museum, since Occidental will pay all expenses connected with the entire headquarters building and all property taxes on the leased property for the period of the lease. (B118). Thus, the entire museum complex constitutes a charitable contribution on Occidental's part.

It should be noted that although both the plaintiffs and the defendants attempt to extract the museum's physical plant from Occidental's charitable contribution, the latter concentrate particularly on the parking garage, which they allowed to be constructed without authorization. Obviously stung by Objector's charge that a "huge hole, visible to all", was excavated on property adjacent to Occidental's headquarters prior to the Special Committee's approval of the charitable contribution, the defendants make a concerted effort to divorce such construction from the museum proposal. Thus, the defendants assert, the garage was built by Occidental "for its own use", and the construction of that facility did not commit Occidental to the rest of the museum proposal if it were "aborted". However, in making the aforesaid assertion, the

defendants ignore both the enormous waste, discussed below, which the new garage would represent if the museum project were not completed, as well as the defendants' liability for such waste.

The defendants' attempt to avoid a charge of waste by portraying the construction of the garage as entirely independent of the museum is grossly misleading. Contrary to the impression sought to be created by the defendants, the entire cost of the new garage is directly attributable to the museum. The record unequivocally establishes that the parking garage was built to replace Occidental's existing parking facility, which had to be demolished in order to build the museum. Prior to the museum construction, Occidental owned and operated a garage adjacent to its headquarters building. The garage, which consisted of 565 spaces, was constructed with one story above ground and two below.<sup>3</sup> However, since the museum building was designed to be erected on the site of the garage, it had to be destroyed. It is undisputed that the parking garage was constructed to replace an existing facility because of the museum proposal. Indeed, Hammer, himself, so testified:

"Q. Was it necessary to build underground parking as part of the plan to build the Hammer Museum?

---

3. (A154). The new garage added 85 spaces.

A. Yes." (A523).

\* \* \*

"Q. The parking garage is being built down to five levels; is that correct?

A. That's correct.

Q. And the reason for building down to five levels is that the museum will sit on top of the parking garage; is that also correct?

A. Yes." (A526-527).

Although the new garage is somewhat larger than the facility which it replaced, the additional spaces were designed to afford parking space for museum visitors. Such spaces were required in order to meet local zoning requirements. Thus, Hammer testified:

"Q. Did you believe that it was necessary to build the underground garage in order to gain permission from the local authorities to erect the Hammer Museum?

A. Yes." (A527).

Asquith confirmed that prior to the museum construction, Occidental owned an existing garage which was required to be replaced by a new facility. Asquith further testified that it was necessary for Occidental to obtain alternative parking during the period between the demolition of the existing garage and the construction of the new facility:<sup>4</sup>

---

4. The cost of such interim parking was not included in the museum budget. (A597-599).

"Q. When Occidental acquired the building, did it also acquire the parking facilities?

A. It acquired the -- yes. Yes.

Q. When the parking facilities were demolished, did Occidental have to enter into an arrangement with another entity for parking facilities?

A. Yes." (A597-598).

Objector submits that in light of the above, the appellees' attempt to disassociate the garage from the museum project, although understandable, is utterly frivolous.

Finally, the appellees ignore the substantial evidence that although Occidental held an option to purchase the Kirkeby building, the actual purchase of that building was effected in order to construct the museum, and accordingly, its cost should be included in the charitable gift. At his deposition, Dr. Hammer so admitted:

"A. The decision [to buy the Kirkeby building] was made by the board of directors of Occidental Petroleum Corporation.

Q. When the board made that decision, was it advised of the plan to build the Hammer Museum?

A. Yes.

Q. Who advised the board of that?

A. Dr. Irani and myself.

Q. And did you tell the board in words or substance that it was necessary to

buy the Kirkeby building in order to have a site upon which to construct the Hammer Museum?

A. Yes.

Q. And the board approved the purchase of the Kirkeby building based upon the representations made to the board?

A. Correct." (A525).

Hammer also testified that Occidental had no intention of purchasing the Kirkeby building prior to Hammer's dissatisfaction with LACMA:

"Q. Did Occidental have an intention to buy the Kirkeby building prior to the time of your disagreement with LACMA?

A. No. After the disagreement.

Q. After the disagreement with LACMA, Occidental took steps to buy the Kirkeby building and the adjoining site; is that correct?

A. That's correct." (A522).

Although Hammer later altered his story when questioned by his personal attorney (B99), he did not explain the change, nor does it appear convincing.<sup>5</sup>

Accordingly, the record demonstrates that the Special Committee did not have the full picture when it approved the museum, and it is unlikely that its approval would be entitled to the protection of the business judgment rule.

---

5. Occidental purchased its headquarters building at a time when other energy companies were selling theirs. (A48).

II

THE RECORD ESTABLISHES THAT  
THE ISSUES WHICH THE COURT  
BELOW COMPLAINED OF IN ITS  
PRIOR DECISION WERE NOT  
RESOLVED BY THE SETTLEMENT  
WHICH THE COURT APPROVED

In its decision denying Objector's motion for a preliminary injunction, the court below was disdainful of the settlement which was contemplated at that time. In its decision, the Court stated that it had scheduled a hearing on the preliminary injunction "because of the existence of most unusual and troubling circumstances." Thereafter, the Court identified certain of the troublesome issues which the settlement had raised. First and foremost on the Court's list was "the failure of the Special Committee appointed by the directors to hire its own counsel and advisors or even to formally approve the challenged acts."

Despite the Court's sharp criticism of the settlement as initially structured, the final agreement was little different. Thus, in its opinion approving the settlement, the Court below complained:

"Despite this Court's expressed displeasure with the settlement efforts, as set forth in its July 19, 1989 opinion in Kahn, the settlement now before the Court is only slightly changed from the June 3, 1989 Memorandum of Understanding."

However, although the Court voiced its displeasure with the final settlement agreement, it was nevertheless, approved. The defendants assert in their brief, that the settlement was approved despite the parties' failure to improve it, because "all" of the "'troublesome' issues" identified in the July opinion had since been addressed "to the satisfaction of the Court below." Defendants' assertion is inexplicable, since the Court's opinion approving the settlement makes plain that this was not the case. In such opinion, the Court below flatly stated that the revised Stipulation of Settlement "did not fully address most of the matters found to be troublesome by th[at] court in its Kahn opinion." (A502).

Thus, the question remains as to why the Court approved a compromise which it had previously given every indication that it would reject. Objector submits that the Court's approval was based in large part, upon its misapprehension of a key fact (discussed in Objector's opening brief), which involved the application of the business judgment rule. The only major change in the settlement calculus which occurred between the Court's first opinion and its settlement approval, was the retention in August, 1989, by the Special Committee of "independent Delaware counsel." The Court below believed that the Special Committee had hired such counsel before it finally approved the museum proposal. Thus, the Court stated that

the Special Committee retained independent counsel, and "subsequently, and for the first time, formally approved the challenged charitable contribution."

Objector submits that it is clear that the approval of the Court below was based upon its belief that a major judicial concern, i.e., the failure of the Special Committee to retain independent counsel prior to formal approval of the museum proposal, had been rectified. As a result, the Court concluded, the business judgment rule would apply.

Although the defendants point to the Court's express displeasure with the settlement as evidence that it "fulfilled its duty to probe", they decline to answer Objector's contention that the Court failed to ascertain that independent counsel was hired only after the charitable contribution had been finally and completely approved, despite the fact that at the time of approval, the Committee had before it a copy of the order of the court below denying Objector's injunction motion. (A493(d)).

Although the Special Committee did not take the Court's decision seriously enough to hire special counsel prior to its approval of the museum proposal, the Committee did see fit to give lip service to the decision. Thus, following its final approval of the museum proposal, in order "to ameliorate any concern that the Court might have as to the independence of the Special Committee's counsel",

the Committee determined to hire independent Delaware counsel" at some future date. Objector submits that the Court below took false comfort from the Committee's language, and that its concern would not have been "ameliorate[d]" had it correctly understood the Committee's action. If it had, Objector submits, the settlement would not (and should not) have been approved.

### III

#### APPELLEES HAVE FAILED TO SHOW THAT THE CONTRIBUTION WAS REASONABLE

The defendants argue that the challenged contribution was reasonable because:

a. The contribution does not constitute waste, since despite LACMA's availability and merit as a permanent home for the art to be displayed and Occidental's prior contribution to that institution, "the Art is not going to LACMA"; and

b. The contribution meets the Theodora test.<sup>6</sup>

As will be demonstrated below, both of the aforesaid contentions are in error, and the contribution is unreasonable in nature and amount.

---

6. Theodora Holding Corporation v. Henderson, Del. Ch., 257 A.2d 398 (1969).

1. The Museum Constitutes Waste,  
Since It Replaces An Appropriate  
Existing Facility Funded By  
Occidental, Which Was Scuttled  
By Hammer On Personal Grounds.

At the outset, the defendants accuse Objector of acting as a "surrogate for LACMA". In making that accusation, defendants miss the point of Objector's argument. Objector has no ties with or loyalty to LACMA. However, both Hammer and Occidental do. Hammer was a trustee of LACMA for many years. As discussed in Objector's opening brief, Hammer often publicly recognized LACMA as the most desirable permanent home for the Collections. Indeed, Hammer stated that his "greatest pleasure in gathering th[e] collection [wa]s the knowledge that it w[ould] eventually be given to th[at] fine museum."

Occidental also publicly recognized LACMA as the Collections' proper permanent home, and contributed substantial sums to ensure that that institution would obtain the art. Occidental financed the reconstruction and refurbishing of the Hammer Wing at LACMA. In addition, Occidental contributed \$6 million for the purchase of the Leonardo da Vinci art now known as "Codex Hammer", on Hammer's stated intention that it be permanently displayed at LACMA. (A277-280). Critics and art experts deplored the removal of the Collections from LACMA, where they could be displayed in the context of other major art. Thus, Objector's conclusion that LACMA is the appropriate facility

for the Collections' permanent display is not based upon personal attachment to LACMA, but rather, upon his well founded belief that the installation of the Collections at that institution would have been in the best interests of Occidental.

Defendants argue however, that what was best for Occidental, is past history. Thus, they assert in effect, Hammer's cruel treatment of LACMA and "the ill will for Occidental [which it allegedly created] in the process", the waste of Occidental's prior donations to that institution, and the expenditure of an exorbitant sum to replace the Hammer Wing with a facility which is inferior from an artistic and community point of view, must all be ignored. In short, defendants argue, the Hammer museum is a fait accompli, which cannot be reversed. Accordingly, it must be accepted.

In making the aforesaid argument, defendants again miss the point. Objector is not attempting to retrieve the Collections for LACMA. Objector is seeking to recover damages for Occidental for the waste of its funds. Defendants contend that the waste was unavoidable, since neither Occidental nor the Special Committee could have changed their chairman's mind. That argument however, has two flaws. First, there is not a scintilla of evidence in the record that either Occidental or the Special Committee attempted to change Hammer's mind. There is no indication

that at any Board meeting, including the meeting of the Executive Committee at which the museum was first broached, any member of the Board reminded Hammer of his longstanding service as a trustee of LACMA, the devastating effect that his decision would have on that institution, the waste of Occidental's prior gifts, the unnecessary duplication of an existing, superior facility, or Hammer's written contract with Occidental which provided for the expenditure by it of \$6 million for the purchase of the Codex Hammer on Hammer's express representation that it would be left to LACMA. (A277-280). Whether the Special Committee could have changed Hammer's mind is a question which remains unresolved, since the Committee never tried. Rather, the Committee capitulated to Hammer's demands for his own museum and aided and abetted his unethical conduct toward LACMA without hesitation.

The second flaw in defendants' argument is their assumption that Occidental was required to pay for Hammer's change of heart which resulted in the destruction of Occidental's prior gifts. Objector submits that if Hammer wished to build his "own" museum, he should have paid for it. The museum is unquestionably Armand Hammer's, and Occidental will ultimately be deprived of virtually all connection with it.

Accordingly, Objector believes, the reasonableness of the nature of the challenged contribution is subject to

substantial doubt in light of the unique circumstances under which it was made.

2. The Amount of The Contribution Does Not Meet the Theodora Test.

The appellees contend that the amount of the challenged contribution meets the Theodora test. However, in order to make the contention, appellees must resort to sleight of hand. Thus, so as to bring the contribution within the present 10% tax deduction limit, appellees are required to argue that in assessing the reasonableness of Occidental's gift, the Court must ignore Occidental's expenditure of at least \$60 million (\$115 million including the Kirkeby building) to construct the museum, and focus solely on the \$39 million cost of the annuity purchased for its support. As discussed above, this specious reasoning should not be countenanced by the Court.

Defendants also resort to trickery in attempting to pass the Theodora test as it relates to net asset value. Defendants assert that even if a figure of \$96 million is used for the amount of the gift, "it represents less than one-half of one percent [the Theodora figure] of the \$20.5 billion net asset value of Occidental." However, Occidental's net asset value is not \$20.5 billion. That figure is its total asset value.<sup>7</sup> Occidental is top-heavy with long-term debt, and

---

<sup>7</sup> Objector requests that the Court take judicial notice of the 10K official filing of Occidental for the fiscal year

its shareholder equity is a little over one quarter of its asset value. Thus, the challenged contribution fails the Theodora net asset value test.

Moreover, the contribution is unreasonable for additional financial reasons. Occidental's profits from operations have not equalled its dividends in the past five years, and the company has had to sell stock, borrow or dispose of assets to pay its dividend. Despite its continued payment of the dividend, Occidental's stock has fallen in a sharply rising market. Accordingly, Objector submits, the challenged contribution is of a nature and amount which is unreasonable for Occidental, and it should not have been approved.

#### IV

#### THE SETTLEMENT IS INADEQUATE

The Court below described the settlement benefits as "meager." Plaintiffs dispute the Vice Chancellor's finding, and argue that the settlement confers benefits of between \$30 and \$50.4 million. As discussed more fully below, the settlement benefits are either illusory or so highly speculative as to confer only de minimus benefit.

1. The Nature And Extent Of The Benefit  
Accruing To Occidental From Naming  
The Museum After It.

In Objector's opening brief, Objector demonstrated that the construction of the museum constituted a waste of

---

ended December 31, 1989. A copy of the relevant pages are contained in Objector's Appendix. (A619-620).

Occidental's funds, since it merely duplicated an existing superior facility, whose reconstruction and refurbishing had previously been financed by Occidental. In their answering briefs, the appellees do not seriously contest Objector's argument with respect to the desirability of displaying the Collections at LACMA. Rather, they argue in effect, that the new construction is not a total waste, since Occidental will obtain some benefit from its connection with the museum. That benefit will be derived primarily from the naming of the museum building after Occidental. The Settlement Agreement provides that the "Museum Building will be named the 'Occidental Petroleum Cultural Center Building'". To this benefit, the plaintiffs attribute a value of \$10 million. They reason that one would have to contribute such an amount to have a museum, like the one herein, named after him.

Even assuming, arguendo, that the plaintiffs' valuation and reasoning are correct, plaintiffs' contention overlooks the fact that Occidental has expended far more than \$10 million to create the museum. As noted, to acquire space for the museum, Occidental purchased an office building and an adjacent parking garage at a cost of \$55 million. In order to provide for the construction of the museum building itself, the parking garage had to be demolished and replaced by a five-story underground facility. In addition, four floors of Occidental's

headquarters building were cleared of tenants and renovated for use as additional museum space. The total cost of construction and renovation is, at least, \$60 million.<sup>8</sup> Further, Occidental has purchased, at a cost of \$38 million (A614), an annuity to provide operating funds for the museum for a 30-year period and a zero coupon treasury bond maturing in 2019 in the face amount of \$55 million.<sup>9</sup> Thus, Occidental's grant to the museum exceeds \$150 million. Since Occidental's benefit, according to plaintiffs, could have been acquired for \$10 million, it would appear that Occidental was grossly overcharged for replacing an existing facility.

Moreover, the benefit of \$10 million is highly exaggerated at best, and unlikely at worst, since it is unclear whether the settlement provision can legally be enforced.<sup>10</sup> A lease, annexed as Exhibit A to the Settlement Agreement (A542-556), provides that "the sole name of the Premises shall be 'Armand Hammer Museum of Art and Cultural Center'". (A554). The term Premises and Art Museum are

---

8. Such cost does not include the cost of alternative parking during demolition (A597-599) nor the cost of relocating tenants. (A581-582).

9. As discussed infra, the bond was purchased to enable the museum to exercise its option to purchase the Office building, Museum and garage in the year 2019 at an exercise price of \$55 million.

10. In addition, the \$10 million hypothetical valuation is not offset by the massive adverse publicity and shareholder reaction which the museum has generated.

treated as equivalent terms, and are defined in Section 1.1 of the lease as the new building, four renovated floors in the Office building, an 8,000 square foot courtyard and the common areas. Section 5.5(c) prohibits Occidental's name or any name other than Hammer's from appearing in or on any part of the "Art Museum".<sup>11</sup>

Although Section 5.5(b) of the lease (A554) provides that the name of the new building shall be "Occidental Petroleum Cultural Center Building", that section and the seemingly conflicting provision which states that the Art Museum can bear no name other than that of Armand Hammer, can be reconciled. The Premises will be named after Occidental, but its name will not appear. However, the provision of the Settlement Agreement, which requires that Occidental's name actually be placed on what that Agreement refers to as the "museum building" (an undefined term), cannot be reconciled with the terms of the lease which expressly forbid such act. Objector is aware

---

11. "Without limiting the foregoing restrictions, tenant covenants and agrees that no part of the Art Museum (including any gallery or exhibition space) shall bear the name of any other person or entity in any respect at any time other than 'Armand Hammer Museum of Art and Cultural Center, Armand Hammer, The Armand Hammer Foundation or the name or names of artists being exhibited therein.' It being the expressed intention and agreement of all parties that the name of any other donor, person or entity shall not under any circumstances be displayed in or on any part of the Art Museum." (A554).

that Hammer's name presently appears on an outsized frieze carved all along the facade of the new building, and on a bronze plaque attached to such building. Pursuant to the lease, Occidental's name will not appear on that building, which is the centerpiece of the museum.

2. Minority Representation  
On The Museum's Board.

From the inception, it was contemplated that Armand Hammer would be chairman of the board of directors of the museum, his grandson, Michael, an Occidental director, would become the director of the museum, and Ray R. Irani, president of Occidental and a member of its board, would be a third director of the museum. It was also contemplated that the museum's board would consist of six additional members selected by Hammer. (A528-529). The initial proposal attached as Exhibit A to the board minutes of the February 16, 1989 minutes states as follows:

"It is anticipated that the Museum will be named after Dr. Hammer and will have a board of directors comprised of nine members, including Dr. Hammer, as chairman of the board; Michael Hammer, Dr. Hammer's grandson and an officer and a director of Occidental; Ray R. Irani, the president and chief operating officer and a director of Occidental; Alex P. Courtelis, a director of an Occidental subsidiary; and five members unrelated to Occidental and Dr. Hammer." (A245).

The settlement does not change the original conception of the composition of the museum's board. It provides:

"For so long as the Museum Building is leased from Occidental by the Museum, Occidental shall have the right to minority representation on the Museum's board of directors. The Museum shall have three persons who are currently directors of Occidental as members of its nine-member board, namely Dr. Armand Hammer, Michael Hammer and Ray R. Irani."

Objectors do not perceive any value in a settlement provision that incorporates a prior existing agreement.

3. Limitations On Future Contributions To Charities Bearing Hammer's Name.

Under the Settlement Agreement, other than grants to the museum, Occidental may not contribute more than 1.3% of its cash dividends, in any one year, to Hammer affiliated charities. However, Occidental may anticipate in any one year, a three-year limit of 3.99%. In 1989, Occidental paid dividends of \$679 million, 1.33% of which is \$9 million. Plaintiffs contend that the \$9 million, one-year, and \$27 million, 3-year limits are necessary to protect Occidental's future charitable gifts.

It is Objectors' view that the settlement "cap" does not change Occidental's prior practice in regard to Hammer affiliated charities. Except for a gift of \$10 million in 1985, to the Armand Hammer United World College

of the American West, Occidental's contributions have been within the one-year limit. Further, the combined gifts in 1985, 1986 and 1987 to Hammer charities were within the three-year limit.

Hammer was 92 years old when the settlement was reached. His rule was drawing to a close.<sup>12</sup> Occidental without Hammer will make future charitable contributions without direction from its former chairman. Objectors do not believe that the proposed limitation provides any measure of benefit to Occidental or its shareholders.

4. The Agreement To Transfer The Art.

The plaintiffs claim credit for a requirement that Hammer and the Foundation execute a written agreement to transfer the art to the Museum. In fact, such an obvious condition was agreed to (A226) and executed before the lawsuits were instituted. (A530-537).

5. Ceiling On The Cost Of Construction Of The Museum.

It will cost \$78.4 million to complete the construction of the museum complex. (A600-605). Such figure is derived from the general contractor's guarantee referred to as a "G-Max". The settlement permits Occidental to commit \$60 million to the project and additional sums within the \$9 million-\$27 million limitation on Hammer affiliated charities. Plaintiffs' claim that the

---

12. Hammer died on or about December 11, 1990.

settlement, by placing a cap of \$60 million, has produced a benefit of "\$19.4 million (sic)" is based upon the unrealistic assumption that the Museum will not be completed.

Moreover, the record reflects that Occidental has engaged in a scheme to conceal the true costs of the construction of the Museum. Objectors attempted to examine the general contractor and to obtain the "G-Max". Although the integrity of the settlement was brought into question by an investigative reporter who had obtained confidential documents outlining the scheme (A557-579), plaintiffs not only failed to investigate the matter but refused to lend their support to Objectors who sought discovery on the matter. Based upon the objections of the defendants, the Vice Chancellor ruled that Objectors could not examine the general contractor. However, the limited discovery allowed to Objectors established Occidental's intent to complete the Museum and avoid the arbitrary limitation placed upon it by the settlement.

6. Occidental's Right To Share In  
Future Profits Realized By The Museum.

Objector believes that the largest cost to Occidental of the museum project may turn out to be the 30-year option granted to the Museum (the "Option"). The Option allows the Museum to purchase in the year 2019 the Museum Building, the Parking Garage and the Office building at \$55 million in the year 2019. In order to ensure that

the Museum will have \$55 million at exercise time, Occidental purchased and donated to the Museum a 30-year zero coupon treasury bond in the face amount of \$55 million. (A540).

The exercise price was determined by the Duncan Appraisal Corporation (the "Appraiser"). The Appraiser, who was selected by Hammer, did not make a personal presentation to the Special Committee, nor did the Appraiser address its report to the Committee. The report, dated February 8, 1989 (A154 et seq.), valued the office building at \$28 million. The Appraiser recognized that the office building was of "quality construction" and located in "one of the best" areas in Los Angeles, factors which he considered important in determining whether the Office building will have value in 2019, when it will be 57 years old. The Appraiser concluded that the Office building will be a shell at exercise time, worth \$32 per square foot.<sup>13</sup> The Appraiser placed a value on the land at its 1987 market value of \$21 million and failed to adjust for inflation or appreciation over the next 30 years.

The Appraiser valued the museum building at cost of \$50 million, less depreciation, instead of the Museum building's actual anticipated cost of \$78.4 million. The

---

13. An amount approximating today's annual rent per square foot for space in the office building.

underground parking garage, which cost \$23 million to construct, was valued at \$12 million.

The Option prevents Occidental from ever selling the Office building and has the practical effect of requiring Occidental to maintain the Office building for the next 30 years, for the benefit of the Museum. At the end of such period, the Office building may be worth many times its cost of \$55 million.<sup>14</sup> If the Office building, museum and parking garage are worth less than \$55 million in 2019, the Museum will keep the \$55 million proceeds from the treasury bond purchased by Occidental, and it will remain the owner of the property.

Instead of addressing the gross unfairness of the Option, the settlement provides that if the museum exercises the Option and if the museum thereafter sells the property at a profit, such profit will be shared with Occidental. The settlement provides an obvious disincentive for the museum to sell the Office building. Although an agreement to divide profits if an Option is exercised and if property is sold, has value, such value is de minimus, due to its highly speculative nature.

---

14. Rockefeller Center is about 60 years old and is the most valuable commercial property in New York. In Wilmington, the Dupont Hotel is about 60 years old.

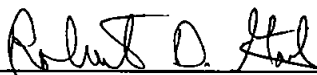
CONCLUSION

For the reasons set forth above and in Objector's opening brief, the approval of the challenged settlement should be reversed.

Dated: Wilmington, Delaware  
December 18, 1990

Respectfully submitted,

BIGGS AND BATTAGLIA

By:   
Robert D. Goldberg  
1206 Mellon Bank Center  
P.O. Box 1489  
Wilmington, DE 19899  
(302) 655-9677

Attorneys for Objector  
Below-Appellant

Of Counsel:

SILVERMAN, HARNES & OBSTFELD  
International Plaza  
750 Lexington Avenue - 14th Floor  
New York, NY 10022  
(212) 754-2333

CERTIFICATE OF SERVICE

I, the undersigned counsel for Appellant, hereby certify that on December 18, 1990, I caused two copies of the Reply Brief of Objector Below-Appellant Alan R. Kahn to be hand delivered and/or mailed to the following:

HAND DELIVERED

William Prickett, Esq.  
Prickett, Jones, Elliott,  
Kristol & Schnee  
1310 North King Street  
P.O. Box 1328  
Wilmington, DE 19899

HAND DELIVERED

Bruce M. Stargatt, Esq.  
Young, Conaway, Stargatt  
& Taylor  
Rodney Square North  
P.O. Box 391  
Wilmington, DE 19899

FIRST CLASS MAIL

Thomas G. Hughes, Esq.  
Schlusser, Reiver, Hughes  
& Sisk  
1700 West 14th Street  
Wilmington, DE 19806

HAND DELIVERED

Grover C. Brown, Esq.  
Morris, James, Hitchens  
& Williams  
222 Delaware Avenue  
P.O. Box 2306  
Wilmington, DE 19899

HAND DELIVERED

Rodman Ward, Jr., Esq.  
Skadden, Arps, Slate,  
Meagher & Flom  
One Rodney Square  
P. O. Box 636  
Wilmington, DE 19899

HAND DELIVERED

Charles S. Crompton, Jr., Esq.  
Potter, Anderson & Corroon  
350 Delaware Trust Building  
P.O. Box 951  
Wilmington, DE 19899

HAND DELIVERED

Richard G. Elliott, Jr., Esq.  
Richards, Layton & Finger  
One Rodney Square  
Wilmington, DE 19801

BIGGS & BATTAGLIA

BY: 

Robert D. Goldberg  
1206 Mellon Bank Center  
P.O. Box 1489  
Wilmington, DE 19899

Dated: December 18, 1990