

#34

DELAWARE SUPREME COURT  
FILED

IN THE SUPREME COURT FOR THE STATE OF DELAWARE

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CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM

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Appellant,  
Objector-Below

No.: 313, 1990

v.

JOSEPH SULLIVAN and ALAN BRODY,  
  
Plaintiffs-Below

Below: Court of Chancery  
In And For New Castle  
County

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

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

Intervenor,  
Defendants-Below,

Appellees.

REPLY BRIEF OF OBJECTOR-APPELLANT  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

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DATED: December 6, 1990

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ARGUMENT

I. DEFENDANTS MISSTATE THE NATURE OF THEIR DELIBERATIONS TO SUPPORT THEIR CONCLUSION THAT THE DECISION TO FUND THE MUSEUM PROJECT WAS AN INFORMED, ADVISED JUDGMENT

A. Plaintiffs' and Defendants' Characterization Of The Directors' Deliberations Is Not Supported By The Record

Plaintiffs and Defendants argue the Occidental Board of Directors deliberated for a period in excess of one year prior to giving final approval to the plan for Occidental to build and fund Dr. Hammer's Museum. (Defendants' Br. at 13-15; Plaintiffs' Br. at 9, 12) Defendants' recitation of facts, intended to convey the impression that funding of the Museum project was discussed so often and so extensively that the Board's decision must have been an informed one, is misleading.

The Museum project was first discussed at an Executive Committee meeting of January 19, 1988. (Defendants' Br. at 13). The sole presentation was by Hammer, no supporting documents were considered, and no outside advice was obtained. (A-164 to A-166) The result, however, was a resolution that allowed Occidental to "proceed with the negotiations of arrangement for the design and construction" of the Hammer Museum and authorized corporate officers to negotiate "agreements for the retention of architects, engineers and contractors, and agreements for appropriate financing of the transactions" contemplated by the resolution. (A-167, A-168)

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Although deliberation was minimal and undertaken without any advice whatsoever, the Executive Committee gave its approval for Occidental to proceed with the contracts for construction of the Museum and arrangements for Occidental's financing of the project, thus resulting in financial commitments by the corporation. In addition, a public announcement of Occidental's plan to build the Hammer Museum was made two days later, with considerable fanfare. (A-356) However far-reaching the result of the January 19, 1988, meeting may have been, the consideration given at that meeting to the issue of Occidental's financial commitment to the Museum project can only be characterized as minimal. The subject of Occidental's funding of the Museum was barely mentioned at the meeting, and was certainly not discussed or deliberated upon.<sup>1/</sup>

The next meeting was a regular meeting of the Board of Directors on February 11, 1988. The minutes for that meeting reflect no discussion or deliberation concerning the Museum project. Rather, the Board merely "expressed approval of the actions "taken by the Executive Committee." (A-355)

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1. Defendants claim that "the need to expand Occidental's parking facilities was recognized as warranting action" at the January, 1988, meeting (Defendants' Br. at 13); Defendants later attempt to describe the parking garage as a separate project. (Defendants' Br. at 36-37) The supporting citation, to the minutes of the meeting, contains no such statement or any statement from which such an inference could be drawn. Rather, those minutes only mention parking facilities in connection with a description of the proposed museum, stating that such museum would include "the expansion of parking facilities". (A-165, A-168)

The next mention of the Museum project was at a Board of Directors meeting on November 10, 1988 when the need for a \$30 million bond was discussed and approved.<sup>2/</sup> No other consideration of Occidental's funding of the Museum project appears in the minutes of that meeting. (B-112)

On December 15, 1988, what Defendants characterize as "a detailed plan" for the Museum project was presented to the Board. (Defendants' Br. at 14) This "detailed plan" consisted of a two-page written proposal regarding the Museum and its funding by Occidental, and a two-page opinion letter from the firm of Dilworth, Paxson, Kalish and Kauffman ("the Dilworth firm"). (A-349 - A-353) This proposal, unlike that ultimately approved, provided for transfer of the headquarters building and the Museum facilities to a holding entity to be owned initially by Occidental. Beginning in 1989, each year for the next thirty years Occidental would transfer one-thirtieth of its shares in the holding entity to the Museum. If in the first fifteen years this distribution to the Museum were less than \$2.5 million, Occidental would contribute sufficient funds to provide a minimum of \$2.5 million each year. (A-350 to A-351)

Defendants state that the Dilworth firm was thereafter

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2. Defendants characterize this bond as being needed for the construction of the parking garage (Defendants' Br. at 14); however, the minutes of the meeting show that the bond was needed "in connection with the construction of the Armand Hammer Museum and Cultural Center." The parking garage is not mentioned. (B-112)

retained to advise the Board. They do not, however, point out that this firm had been selected by Hammer and was at that time representing him personally. (A-105a, A-113)<sup>3/</sup>

The first consideration of a detailed proposal, with some supporting documentation, came at a February 16, 1989, Board meeting. Contrary to Defendants' assertions, this was the first time Occidental's funding of the Museum project was considered in any detail. The prior discussion of the project cannot properly be characterized as more than a cursory examination of Occidental's involvement in the project with no consideration of such issues as the financial and tax consequences to Occidental, the nature of the project and the propriety of Occidental funding a Museum for its Chairman. The record clearly does not support the conclusion that the Defendant Directors engaged in informed deliberations for a lengthy period before approving the Museum project.

The Special Committee approved the project, committing Occidental to an extraordinary expenditure after a two-hour meeting, without benefit of independent legal, accounting, or appraisal advice. (A-105a, A-113, A-115, A-180) The Special Committee was woefully uninformed on a number of very

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3. Defendants also state that the firm of Skadden, Arps, Slate, Meagher and Flom was "retained to advise the Board" on tax issues. (Defendants' Br. at 15, emphasis added) Defendants' citation to the record does not, however, provide any support for this statement. Rather, the record shows that the Skadden, Arps firm was counsel for the proposed Museum (A-337), and therefore could not provide the Board with independent advice.

important issues, as described in Objectors' Opening Briefs. (See CalPERS Opening Brief at 12-13 and 20-21; Kahn Opening Brief at 11-12.)

Defendants attack Objectors' description of the Special Committee's failure to inform itself of all material information reasonably available to it by pointing out that Objectors' statements are principally supported by reference to the deposition testimony of Senator Gore. Defendants' attack rests on the fact that Senator Gore is only one member of the Special Committee, and the suggestion that his recollection of matters that transpired "many months" before would not reflect his understanding at the time of the transaction.<sup>4/</sup> (Defendants' Br. at 34-35)

Senator Gore, a witness whose credibility and competence have not been questioned, was the Chair of the Special Committee. It would seem his testimony could appropriately be relied upon. Furthermore, although Defendants have had ample time and opportunity to rebut Senator Gore's deposition testimony, they have not done so.<sup>5/</sup>

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4. It should be noted that the "many months" referred to by Defendants was in fact four months. The meeting was February 16, and Senator Gore's deposition was June 27.

5. Defendants suggest Objectors purposely avoided taking depositions of other Special Committee members. (Defendants' Br. at 35) This unsupported innuendo ignores Defendants' efforts to prevent or limit discovery by their motion to stay discovery and opposition to discovery requests. It also ignores the fact that CalPERS' September 18, 1989, motion to intervene was not granted until February, 1990. (B-7) CalPERS therefore had no opportunity to take discovery as a party, and its request for discovery as an objector was only partially

The Special Committee met again on July 20, 1989, after the Delaware shareholder actions had been filed. Defendants refer to this meeting as the "final decision" and "final approval" of Occidental's funding of the Museum project. (Defendants' Br. at 32, 35) The record cited in support of Defendants' characterization is an affidavit of C. Erwin Piper, a member of the Special Committee. That affidavit, however, makes clear that the subject of the July 20 meeting was not a reconsideration or even a further consideration of the propriety and desirability of Occidental funding Hammer's Museum. Rather, the purpose of that meeting was simply to determine whether the conditions the Special Committee had imposed on February 16 when it approved funding of the Museum had been met. (A-493b - A-493c) The Committee also discussed settlement of this action and had before it at that time the Memorandum of Understanding which ultimately became the settlement agreement in this matter. (A-493c - A-493d)<sup>6/</sup>

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granted. (A-425 - A-426)

6. The Piper affidavit describing this meeting also shows Occidental and Hammer had not even waited for the Special Committee to determine the conditions had been fulfilled before going forward with a very important part of the Museum project. Although the affidavit recites that after this meeting, Occidental was authorized to proceed with purchase of the annuity for support of the Museum (A-493d), it appears Occidental had purchased such annuity long before. Although authorization to fund the annuity was predicated upon satisfaction of the conditions (A-239, A-226), which conditions were not found to be satisfied until July 20, Occidental had taken a pre-tax charge of approximately \$36 million in the first quarter of 1989 to provide an annuity to

Defendants cite no evidence whatsoever to indicate that the July 20 meeting was for the purpose of reconsidering funding of the Museum project, or that any such reconsideration was undertaken at that time. There is no indication that the Special Committee actually considered eliminating or reducing Occidental's expenditures for the Hammer Museum at the meeting. Indeed, it is difficult to understand why the Committee would consider changing its prior commitment on July 20. The Special Committee had before it at that time, in the Memorandum of Understanding, a proposed settlement that would end the shareholder lawsuits and ratify the Directors' actions, at no cost to the Director Defendants.

B. The Record Does Not Support Defendants' Argument That Funding Of The Museum Project Was Not Approved Until July 20, 1989

Defendants argue that because there was no final approval of the Museum project before July 20, 1989, and no contractual commitment to make the proposed gift until that date, Objectors' analogy to Smith v. Van Gorkom Del.Supr., 488 A.2d 858 (1985) must fail. (Defendants' Br. at 36-37). Defendants' argument is invalid, for two reasons. First, there was a commitment and approval to fund the Museum project on February 16, 1989; and second, even if there was no approval before July 20,<sup>1/</sup> the decision at that meeting was no

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fund the Museum. (B-358).

7. Defendants also materially misstate Objector's argument. Defendants state Objectors argue the Museum project was "approved unconditionally" on February 16; that argument

more an informed and advised judgment than was the one of February 16.

1. Commitment and Approval of Occidental's  
Funding of the Hammer Museum Occurred  
On February 16, 1989

It was clearly the view of Occidental that a commitment had been made on February 16, 1989. There was no hint in Occidental publicity or anywhere else that the corporation might withdraw from its commitment to build and fund Hammer's Museum. (A-356, B-378) In fact, Occidental used the word "commitment" to characterize its agreement to fund the Museum in its May 12, 1989, Supplement to Proxy Statement. (B-358) Occidental stated unequivocally in its April 25, 1989 Proxy Statement that the Special Committee had "approved" the Museum proposal, and that Occidental would fund the cost of constructing the Museum and an expanded parking facility beneath the Museum, as well as renovating portions of the headquarters building for use by the Museum, and would provide support through the funding of an annuity. (B-339)

Occidental's characterization of the February 16 approval as a "commitment" is borne out by the language of the minutes and resolutions from that meeting. For example, it was decided not to halt construction, even though the conditions imposed had not yet been fulfilled, but rather to proceed "immediately" to take all necessary steps to continue

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was not, in fact, made by Objector, whose opening brief made it clear that the Special Committee imposed conditions on its February 16 approval. (CalPERS Opening Br. at 11)

and complete the parking garage, renovation of the floors to be used by the Museum and construction of the Museum building. (A-226; emphasis added) At the February 16 meeting, the Board approved Authorizations for Expenditures (AFE) for the Museum and renovation of the four floors, at a cost of \$27 million, and for the parking garage, at a cost of \$23 million<sup>8/</sup> (A-226 - A-227, A-246, A-247) Surely this is clear evidence that a firm commitment was made in February, 1989.

Defendants argue, however, that the fact that construction proceeded without halt is not evidence of a February 16 commitment, since the February 16 decision included approval of construction of the parking garage, as well as the Museum. (Defendants' Br. at 36-37) This argument is clearly insufficient on its face to rebut the evidence of a February 16 commitment and approval of the Museum project. The argument also fails because the parking garage was not a separate, independent project, even though Defendants attempt to portray it as such.

The parking garage was always considered a necessary and integral part of the entire Museum project. (A-226 - A-227, A-257, A-519 - A-521, B-378). The garage was necessary to the Museum project because construction of the Museum

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8. Prior to the July 20 meeting, expenditures and obligations were incurred by Occidental in connection with the construction of the Museum and parking garage and renovation of the four floors. Some of those expenditures and obligations, for such services as general contractor, engineers, and architects, are evidenced by the exhibits from a June 20, 1989, deposition. (See A-61 - A-81c)

building involved demolition of the existing parking structure. (A-170, A-257, A-483) A larger structure was needed to accommodate both Occidental (whose prior parking was on the Museum site (A-483)) and to provide parking facilities for museum visitors in the congested area where the Museum is located. (A-171) The lease between Occidental and the Museum provides for use of the parking structure by the Museum. (A-515 - A-518)

All Defendants are left with is an argument that there was no commitment and approval on February 16 because some conditions remained to be fulfilled. Given Occidental's own views and pronouncements of the commitment represented by the February 16 approval, the minutes of the meeting reflecting such commitment, and a determination, carried out by Occidental, to proceed with the construction of the project without delay, it can hardly be argued that the conditions imposed on February 16 made the commitment of that day any less final or binding.

Defendants appear to view the requirement that the conditions be satisfied as an adequate substitute for some real action or deliberation on the part of the Board. Defendants ignore the important fact that the conditions imposed on the February 16 approval did not leave the Board of Directors with a basis for withdrawal of their approval. Fulfillment of all the conditions was in the hands of parties other than the Board; so long as those other parties fulfilled

the conditions, no further action on the part of the Board, other than noting the conditions had been fulfilled, was required or provided for. So long as the conditions were fulfilled, there was a commitment. Defendants' argument could only succeed if the conditions themselves addressed the fundamental problem of the lack of an informed, deliberate and advised decision by the Board of Directors.

2. The July 20 Meeting Represented Neither  
An Informed And Advised Judgment,  
Nor A Cure For The Uninformed  
Decision of February 16

The decision of the Special Committee on February 16 to approve funding of the Museum project was neither informed nor deliberate, and was not cured by any subsequent conduct. (See CalPERS Opening Brief at 8, 11-13, 19-23.) Even assuming that the decision to approve funding of the Museum project was not made until July 20, it is difficult to understand how that advances Defendants' cause.

Defendants argue there was no commitment or approval prior to July 20, 1989, as a response to Objectors' argument that the February 16 decision was neither informed nor deliberate. (Defendants' Br. at 34-37) Defendants, however, fail to specify any new substantive information or advice the Special Committee received and considered between the February 16 meeting and the July 20 meeting. Defendants have provided no basis for concluding that anything occurred at or prior to the July 20 meeting that changed the uninformed, unadvised decision of February 16 to an informed and deliberate one;

there is no such evidence to cite. The July 20 meeting was concerned only with the proposed settlement in this matter and the fulfillment of the conditions imposed in the February 16 decision. (A-493b - A-493c)

Certainly there is no evidence in the record or cited by Defendants that the Special Committee received information on or prior to July 20 regarding the unfavorable publicity the Museum had received, the damage to the Los Angeles County Museum of Art ("LACMA"), Hammer's reneging on his promises to LACMA and the ill will attendant thereto, and the questioning in the Los Angeles community of the need for or appropriateness of a separate museum for Hammer's collection. Yet these issues, among others, are all relevant, even essential, to the generation of good will for Occidental from the Museum. That good will was the justification cited by Occidental and its Board for the extraordinary expenditure in support of the Museum. (B-339)

Although the Special Committee had a duty to ascertain that the conditions imposed had been fulfilled, so long as those conditions were fulfilled (a matter outside the Board's control), there was nothing further for the Committee to do or decide. There is absolutely no evidence that any reconsideration of Occidental's funding of Hammer's Museum was undertaken by the Special Committee at their July 20 meeting (A-493b - A-493d), or that the Committee received or considered any independent advice. (A-493d - A-493e)

There were subsequent meetings of the Special Committee with its newly retained independent counsel, the first such meeting taking place on August 14, 1989. (A-493d - A-493e) These meetings, however, cannot cure the breach of fiduciary duty, as they occurred far too late. Even Defendants put the "final approval" of Occidental's funding of Hammer's Museum no later than July 20, 1989. (Defendants' Br. at 35) Furthermore, there is no evidence that any serious consideration was given at any of these meetings to eliminating or substantially reducing Occidental's expenditures for the Museum.

As of the July 20, 1989, meeting, the Special Committee still did not have independent legal or accounting advice, or an independent appraiser. (A-493d - A-493e) By this time, Occidental had obviously spent considerable sums and contracted to spend much more. Excavation was under way at the time of the February 16 meeting, and had proceeded apace in accord with the directive of the Board to undertake all necessary steps to complete the project. (A-226) The Board had noted the high cost of halting construction work at the time of the February 16 meeting. (Defendants' Br. at 18, A-342, B-307) Obviously, the cost was a great deal higher six months after that decision and a year after the project had begun.

The analogy to Smith v. Van Gorkom is valid. Defendants in that case contended they had deliberated three

times and made an informed decision. The Court, however, found the initial decision to have been uninformed, found the second meeting was not for reconsideration of the decision, and further found that by the time of the third meeting, the Board was no longer free to turn down the merger proposal it had originally approved. Smith v. Van Gorkom, 488 A.2d at 871-872, 883, 888. Although the decision of the Defendants in this matter to fund the Museum did not require the execution of an agreement like the merger agreement involved in Smith v. Van Gorkom, the Defendants were as committed to their decision on February 16, 1989, as were the defendants Smith v. Van Gorkom. Even if that commitment was not firm or final until July 20, there was no reconsideration of the decision or consideration of additional information or advice at that time that could cure the original breach of duty.

The February 16 decision of the Special Committee to proceed with funding of the Museum project was not the result of an informed, deliberative process, and is therefore not entitled to the protection of the business judgment rule. On the basis of that decision, Occidental publicly announced its plans to build and fund the Museum and proceeded, without delay or interruption, to spend money in doing so. The failure to act in an informed manner constituted a breach of fiduciary duty when it occurred on February 16; it did not become less of a breach because of subsequent events.

The reason for this conclusion is clear. To allow

otherwise is to permit a board of directors to engage in improper conduct and fail to meet its fiduciary obligations, to the detriment of the corporation, and yet still win the day and have its will prevail. Under such a rule, the requirement of a good faith, informed decision would be meaningless.

II. DEFENDANTS RELY ON RHETORIC AND MISCHARACTERIZATION OF THE RECORD TO SUPPORT THEIR ARGUMENT THAT THE GIFT IS REASONABLE IN PURPOSE AND AMOUNT

A. Defendants' Characterization Of Objectors as "Surrogates" For LACMA Is Inaccurate

Defendants claim Objectors have acted as "surrogates" for LACMA in arguing that Hammer should have left his collection to that museum.<sup>9/</sup> (Defendants' Br. at 40-41). Defendants argue the reason for Hammer's decision to renege on his promises to LACMA and build his own museum has no relevance to the propriety of the decision of the Special Committee. (Defendants' Br. at 43)

Defendants' argument ignores the fact that Defendants' justification for the extraordinary expenditure of \$96 million to fund the Museum project is the good will that will supposedly inure to the corporation as a result of its building Hammer's Museum. (Defendants' Br. at 5-6, 13, 16, 30, 33, 42-43; Plaintiffs' Br. at 10-11, 15) The issues raised by Objectors with regard to LACMA are all relevant to

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9. The portion of CalPERS' Opening Brief cited by Defendants contains no suggestion the art "should" have gone to LACMA. This is not Objector's argument, but Defendants' fabrication.

the issue of good will.

Defendants' attitude seems to be that Occidental has no right whatsoever to expect any consideration of its interests in Hammer's decision regarding donation of his collection, and that Occidental is therefore justified in spending \$96 million in an attempt to insure the corporation will continue to be associated with the collection. (Defendants' Br. at 41-43, 46-47). This ignores Occidental's considerable contributions to LACMA in support of Hammer's promised donation of his collection to that museum (A-139), as well as Occidental's generous gifts and significant contributions toward the building of the Hammer Collection. Occidental donated the entire sum used to purchase a significant part of the collection, the Leonardo da Vinci manuscript known as Codex Hammer. (A-278) Defendants also ignore Occidental's very significant contributions to the Armand Hammer Foundation; the Foundation purchased a significant portion of the collection. (A-515, A-429-431)

Objectors have raised valid arguments relevant to the issue of good will. To characterize this as acting as a "surrogate" for LACMA is absurd. Defendants ignore the record of ill will and controversy generated by Hammer's actions.

Defendants also mischaracterize the record with regard to Hammer's purpose in renegeing on his promises to LACMA and choosing to build his own museum. Defendants claim Hammer's decision was due to his failure to receive satisfactory

assurances regarding the collection's care and treatment. (Defendants' Br. at 6) The evidence cited by Defendants, however, includes deposition testimony by Hammer indicating his principal reason for his change of heart was LACMA's putting up names of other donors. (A-91, A-92) The other evidence cited provides no support for Defendants' characterization. (See B-762 to B-767.)

There is, however, ample evidence that Hammer reneged on his promises and elected to have his own museum built largely out of pique and anger. (A-93 - A-94, A-124, A-536) There is also evidence that, contrary to Hammer's later assertions that LACMA lacked sufficient space, there was sufficient space at LACMA for his collection. (A-170, A-258) In fact, the evidence supports the conclusion that Hammer reneged on his promises simply because he wanted his own Museum, on his conditions and under his control; he just did not want to pay for it.

These issues, although appearing extraneous, have a direct impact on the question of good will. The background discussed by Objectors, including facts concerning LACMA, is relevant as rebuttal to Plaintiffs' and Defendants' arguments that Occidental will receive such substantial good will as a result of its paying for the Museum, that the \$96 million expenditure is justified. The issue is not where the art should go, but whether Occidental should pay the full cost to house it. Hammer's dealings with LACMA and the controversy

attendant thereto would not be relevant if Hammer were paying for the Museum, rather than Occidental, a publicly-held corporation.

Defendants' and Plaintiffs' arguments also ignore the fact that it is not at all clear that whatever good will may accrue will be to the benefit of Occidental, rather than Hammer. Much of the evidence cited by Defendants (Defendants' Br. at 6) in support of their claim that Occidental, and not Hammer alone, has received public recognition for its role in the creation and exhibition of Hammer's collection consists of conclusory statements, without supporting evidence, by Hammer and by Franklin Ashley, a spokesperson for Occidental. (See, for example, A-164 to A-168 (Hammer's presentation to the Executive Committee, without supporting evidence); B-97 - B-98 (conclusory statements of Hammer, without supporting evidence; B-441, B-448 to B-449 (conclusory statements of Ashley); B-481, B-744 to B-751 (conclusory statements from Annual Reports without supporting evidence).)

B. The Gift Approved By Defendants  
Does Not Meet The Test Of  
Reasonableness

Plaintiffs and Defendants argue that the cost of the gift approved by the Board of Directors was not the \$96 million the Board authorized for construction of the Museum facilities and parking garage and funding of the annuity. Rather, they argue, since the Museum facilities and garage are not being donated to the Hammer Museum at this time, only the

\$36 million annuity need be considered. This amount, they point out, is reasonable according to the "helpful guide" of the Internal Revenue Code, approved in Theodora Holding Corp. v. Henderson, Del.Ch., 257 A.2d 398 (1969). (Defendants' Br. at 45; Plaintiffs' Br. at 13-14) For the reasons discussed below, the cost of the gift must be viewed as at least \$96 million.

At issue here is a claim of waste. The "gift" in question is the amount of the "gift of corporate assets" constituting waste. That amount should be measured as \$96 million, the amount Occidental actually spent in building the Museum facilities and funding the annuity.

Plaintiffs' and Defendants' focus on the amount deductible for tax purposes (\$36 million for the annuity) ignores the cost of the gift approved by the Board of Directors when they committed Occidental to funding of the Museum project. The fact that the \$60 million spent on construction is not a charitable gift for tax purposes does not change the fact that that amount, plus the annuity, represents the cost of the gift of corporate assets made by Occidental.

No one has or seriously can contend that Occidental would have spent \$60 million on the Museum facilities were it not for its desire to erect such a museum. Occidental's out-of-pocket costs were \$96 million, not \$36 million. Further, the construction costs of \$60 million will not be offset or

justified, as such expenditures normally would be, by future income, use or appreciation in value. Both the funds spent and the resulting facilities will be unavailable to Occidental for at least 30 years.

The fact that rent-free use, rather than title to the facilities, was granted does not mean the cost of this portion of the gift is zero. Even if the \$60 million spent on construction is not considered the best measure of the amount of waste of corporate assets, some alternative value, such as the foregone value of the property and facilities unavailable to Occidental, should be used. The rental income on the 79,000 square feet provided rent-free to the Museum for 30 years would be enormous, even when discounted to present value.

The \$96 million cost to Occidental is not reasonable under the guidelines approved in Theodora. The court in that case suggested that in assessing the validity of a gift for charitable purposes, "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." Theodora Holding Corp. v. Henderson, 257 A.2d at 405.

The court then noted that the gift at issue was "well within the federal tax deduction limitation ..." It would therefore seem that whether or not a gift made for charitable purposes is tax deductible is an important guide in determining whether the gift is reasonable.

The cost of the gift here clearly fails that test. Only the \$36 million for the annuity is deductible. The cost of constructing the Museum and parking garage, and renovation of the four floors to be used by the Museum, is not deductible as a charitable donation, even though the funds were spent for a charitable purpose. (B-123 - B-125, B-127). Thus, the bulk of the cost of Occidental's charitable gift, whether measured by the \$60 million spent by Occidental or by the foregone value of the Museum facilities, is not deductible as a charitable donation. The gift cannot be justified under either the guide provided by the Internal Revenue Code, approved in Theodora, or the test of reasonableness outlined in that case.

III. PLAINTIFFS AND DEFENDANTS MISCHARACTERIZE THE SETTLEMENT BENEFITS

There is no basis for the settlement benefits claimed by Plaintiffs and Defendants. (Defendants' Br. at 48; Plaintiffs' Br. at 16-18) As set forth below, the following "benefits of the settlement," cited by Plaintiffs and Defendants, can hardly be characterized as such:

- (1) Public recognition of Occidental's contribution.

Putting the corporation's name on the Museum building can hardly be called a benefit of the settlement since the original proposal approved at the February 16, 1989 Special Committee meeting required that Occidental be recognized and acknowledged. (A-244) In any event, this seems the least that should be done since Occidental is paying for the entire

Museum. The facility itself (that is, the Museum) is not, however, being named for Occidental. The sole name for the Museum premises is Hammer's, and only Hammer's name is allowed on the Museum or any part of it. (A-413d)

(2) Representation on the Museum's Board of Directors.

Occidental is entitled to minority representation on the Museum's Board. This, however, was also part of the proposal as originally approved. (A-245, A-402).

(3) Written agreement to donate the collection.

This also was part of the originally approved proposal. Approval of the project at the February 16, 1989 meeting of the Special Committee required execution of documents for the transfer of the collection. (A-238)

(4) Limitation of donations to Hammer-related charities.

Future contributions to Hammer charities are limited to 1.33% of cash dividends paid to common stockholders in the prior year. The "benefit" of this provision is entirely illusory as the chart below shows:

<u>Year</u>	<u>Prior Year's Dividends</u>	<u>1.33 % of Dividends</u>	<u>Occidental Contributions (A-515)</u>
1983	\$322 million	\$4.28 million	\$ -0-
1984	\$604 million	\$8.03 million	\$150,000
1985	\$501 million	\$6.66 million	\$13.3 million
1986	\$480 million	\$6.38 million	\$4.11 million
1987	\$447 million	\$5.95 million	\$5.03 million
1988	\$548 million	\$7.29 million	\$4.50 million
1989	\$607 million	\$8.07 million	\$2.50 million

The limitation imposed by the settlement would not have

affected the amount contributed to Hammer-affiliated charities in any of the years shown above. Although the contribution for 1985 exceeded 1.33% of the prior year's dividend, the settlement allows aggregation of amounts not used in previous years. The \$13 million contribution in 1985 would therefore have been permitted under the settlement.

(5) Limitation on cost.

The settlement limits construction costs to \$60 million. The proposal originally approved by the Board, however, was for expenditure of only \$50 million on construction. Thus this settlement "benefit" amounts to ratification of an increase in expenditures of 20% over what was originally approved.

(6) Occidental's right to 50% of sale proceeds.

If the Museum exercises its option to purchase the Museum facilities and headquarters building in 30 years and then sells the property, Occidental will receive one half of any consideration above the \$55 million option price; if the Museum transfers its option, Occidental will receive one-half of any consideration. Although this provision has some potential value, it is minimal and it is entirely speculative, depending on actions of the Museum.

Plaintiffs' and Defendants' attempt to manufacture settlement benefits fails in light of the record. Plaintiffs, however, accuse Objectors of ignoring the record on which the Court below relied in finding the settlement adequate.

(Plaintiffs' Br. at 18) As support for this argument, Plaintiffs cite an affidavit, filed to justify their request for \$1.4 million in attorneys' fees, purporting to quantify the benefits at \$30.4 million to \$54.4 million.

The Court below obviously did not rely on the record cited by Plaintiffs, since the Court found the benefits of the settlement to be "meager". Sullivan v. Hammer, Del. Ch., C.A. No. 10823 (Aug. 7, 1990). (A-494) Furthermore, the Court below viewed the estimates of the affidavit cited by Plaintiffs "with a good deal of skepticism." Id. at 19. (A-513) The Court below substantially reduced the requested attorneys' fees, in part because the value of this settlement was "significantly less than plaintiffs claim." Id. at 20. (A-514) The settlement benefits cannot be viewed as anything more than minimal.

#### CONCLUSION

The record is replete with evidence the Special Committee and other Directors were grossly negligent in failing to inform themselves of all material information reasonably available to them. The record also shows that the gift at issue was unreasonable, both in size and in purpose. It is not necessary at this stage of the proceedings that the evidence be sufficient to prove the claims of waste and gross negligence, nor is it necessary for the Court to try the case or decide the issues on the merits in determining whether a settlement is properly approved. Polk v. Good, Del.Supr., 507 A.2d 531, 536 (1986). Given the very minimal

benefit conferred by the settlement and the legitimacy of Objectors' claims, the Court below clearly abused its discretion in approving the settlement.

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