

IN THE
SUPREME COURT OF THE STATE OF DELAWARE

BTRTA FOREST PRODUCTS, INC., :
a Delaware corporation, MATTHEW :
SUNSTEIN, VIKRAM SARABHAI, :
MICHAEL F. ALLEN, MILES D. LIU, :
KATHLEEN L. TODMAN, HERBERT :
McCUSKER, PAULA ABAZIAN, JANICE L. : No. 142, 2012
STERN, WILLIAM D. HEMPHILL, :
RAVERT WARD L.P., and BTR :
ACQUISITION CORP., :
Defendants Below, :
Appellants, :
v. :
CONSOLIDATED FOREST INDUSTRIES :
CO., a Delaware corporation, :
Plaintiff Below, :
Appellee. :

CONSOLIDATED FOREST INDUSTRIES :
CO., a Delaware corporation : Court Below:
a Delaware Corporation, : Court of Chancery
Plaintiff, : of the state of Delaware
v. : Civil Action No. 6943-CJ
BTRTA FOREST PRODUCTS, INC., :
a Delaware corporation, MATTHEW :
SUNSTEIN, VIKRAM SARABHAI, :
MICHAEL F. ALLEN, MILES D. LIU, :
KATHLEEN L. TODMAN, HERBERT :
McCUSKER, PAULA ABAZIAN, JANICE L. :
STERN, WILLIAM D. HEMPHILL, RAVERT :
WARD L.P., and BTR ACQUISITION :
CORP., :
Defendants. :

APPELLANTS' OPENING BRIEF

Team A
Counsel for Defendants
Below, Appellants

Dated: February 10, 2012

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NATURE OF PROCEEDINGS

The present action was commenced in the Court of Chancery on December 16, 2011 by Plaintiff Consolidated Forest Industries Co. ("CFI") against defendants: (1) Ravert Ward L.P. and its wholly-owned subsidiary, BTR Acquisition Corp., (Collectively "Ravert Ward") (2) BTRta Forest Productions, Inc. ("BTRta"), and (3) members of BTRta's board of directors: Matthew Sunstein, Vikram Sarabhai, Michael F. Allen, Miles D. Liu, Kathleen L. Todman, Herbert McCusker, Paula Abazain, Janice L. Stern, William D. Hemphill (collectively "The Board").

On January 23rd, CFI moved for a preliminary injunction against consummation of the merger of BTRta and Ravert Ward. On January 26th, Chancellor Meghan Jueell granted CFI's motion for a preliminary injunction. On January 31st, an order enjoining BTRta from any further action to effectuate the merger agreement was entered.

Defendants appealed the interlocutory order on February 2nd pursuant to Supreme Court Rule 42, which was granted by Justices Ridgely, Jacobs, and Vice Chancellor Noble on February 10th. Ravert Ward - defendant, nominal appellant - has not participated in the briefings on the pending motion, having determined Defendants adequately represent their interests.

This is Appellants' Opening Brief.

SUMMARY OF ARGUMENTS

The Order for Preliminary Injunction should be reversed because Revlon duties are not applicable and the Board fulfilled its fiduciary duties in accepting the Ravert Ward proposal. The duty to seek the highest price under Revlon was not triggered where BTRta faced neither inevitable bust-up nor accusations of self-dealing. In the absence of Revlon's enhanced duties, it was permissible for the Board to pursue a proposal that complied with its social and environmental practices. The Board fulfilled its duties of care and loyalty by defining its duty of care under Section 102(b)(7) to focus on environmental practices. The Board likewise complied with its duty of loyalty by not engaging in self-dealings.

The Ravert Ward Agreement is not so preclusive or coercive as to be found draconian. The Ravert Ward Agreement contains provisions that allow the Board to exercise its fiduciary duties. Although the deal protection devices locked-up the merger with Ravert Ward, the devices were reasonable because the Board never abdicated its duties to BTRta's shareholders.

Alternately, appellants pray that this Court overturn its decision in Omnicare, Inc. v. NCS Healthcare, Inc. Omnicare erred in using the Unocal standard to address the reasonableness of deal protection devices. The directors in Omnicare were disinterested, acted in good faith, and there was no hostile bid. The directors' decision should not have been subjected to the Unocal standard. This Court should have granted the Board protection under the business judgment rule.

STATEMENT OF FACTS

BTRta is a Delaware corporation engaged in manufacturing environmentally sustainable forest products. (Op. 4). BTRta's social and environmental consciousness is reflected in the Board's duties and liabilities defined in Article II of its Certificate of Incorporation. (Op. 7). It provides:

[... In] determining what is in the best interests of the Company and its stockholders, a Director shall consider the long term prospects and interests of the company and its [...] effect of the Company's operations [...] on the environment and the economy of those communities and the larger world. [... Any] Director is entitled to rely upon the definition of "best interests" as set forth above in acting as a Director and in discharging the duties of a Director, and such reliance shall not be construed as a breach of a Director's fiduciary duty, even in the context of a Change in Control Transaction where, as a result of weighing other Stakeholders' interests, a Director determines to accept an offer with a lower price per share than a competing offer. (Op. 6)

BTRta's Certificate of Incorporation provides for two classes of common stock, Class A Common Stock ("Class A") and Class B Common Stock ("Class B"). (Op. 5). In combination with an unspecified number of family members, Sunstein and Sarabhai own all of the Class B stock constituting 50.4% of the voting power. (Op. 5-6). Class A and Class B are in identical all rights, except the number of votes per share. (Op. 5).

In May 2011, the Board decided to sell all equity interests in BTRta (Op. 8). The Board instructed Eberhard Jefferson L.P. ("Eberhard"), BTRta's independent financial advisor, to identify potential acquirers. (Op. 8). The process of identifying bidders

proceeded slowly. (Op. 8). By late summer, CFI expressed an interest in acquiring BTRta because it felt two of BTRta's divisions would complement CFI's operations. (Op. 8). CFI is a publicly traded Delaware corporation headquartered in Boise, Idaho, with operations throughout the United States, Canada, Brazil, Indonesia, and Central America. (Op. 3). Through its acquisitions of smaller forest product companies, CFI has become one of the world's largest producers of paper and wood products. (Op. 3).

Negotiations were prolonged due to the Board's concern with the tension between CFI existing practices and BTRta's environmentally responsible operations. (Op. 9). CFI offered Sunstein and Sarabhai a position where they would be consulted when substantial policy changes occurred. (Op. 9). The Board approved the BTRta-CFI merger proposal ("CFI Agreement") on October 17, 2011. (Op. 10). Pursuant to the CFI Agreement's Go-Shop, Superior Proposal, and termination fee provisions, the Board and Eberhard sought out a Superior Proposal for their shareholders in Ravert Ward. (Op. 10).

Sunstein and Sarabhai located Ravert Ward as another potential buyer. As a leading organizer of socially responsible corporate acquisitions, Ravert Ward assured BTRta that its environmentally responsible practices would not change. (Op. 11). Moreover, Ravert Ward intended to consult Sunstein and Sarabhai to sustain BTRta's environmental practices. (Op. 11). In exchange, Ravert Ward conditioned the merger upon BTRta's compliance with several requests: (1) a voting lockup of the those Class B shares owned by Sunstein and Sarabhai, (2) a force the vote provision requiring BTRta to put the

proposal to a stockholder vote even if the Board no longer recommended the transaction, (3) a non-solicitation clause, and (4) a termination fee. (Op. 12). Appellees do not allege that Sunstein and Sarabhai were motivated by a financial self-interest (Op. 2).

ARGUMENT

First Question Presented

Whether the Board's decision to merge with Ravert Ward violated Revlon's heightened fiduciary duties.

Scope of Review

The opinion of the Court of Chancery of the State of Delaware is clearly wrong as to the validity of the Ravert Ward Agreement based on the inferences drawn and reasoning used therein. In reviewing the opinion of lower courts, this Court sits in review of both law and fact. Lank v. Steiner, 224 A.2d 242, 267 (Del. 1966). Where justice so requires, this Court may make its own findings and ignore those below. Id. Thus, the Board's conduct is subject to de novo review. Nixon v. Blackwell, 626 A.2d 1366, 1375 (Del. 1993). As to the propriety of the findings of fact, the reviewing court looks at the entire record and the sufficiency of evidence to test the propriety of those findings. Levitt v. Bouvier, 287 A.2d 671, 673 (Del. 1972).

Merits of Argument

I. The Order granting the Preliminary Injunction should be reversed because the Ravert Ward Agreement did not invoke Revlon's enhanced scrutiny and the Board upheld their fiduciary duties.

Courts have long deferred to the business decisions of directors. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 180 (Del. 1986). Delaware courts apply a lower standard of scrutiny known as the business judgment rule when reviewing the directors' decision. Id. The business judgment rule grants corporate directors wide discretion in making decisions that affect the corporation and shareholders. Id. However, this deference is not unyielding. Revlon illustrates that in the context of self-dealing transactions,

directors' duties change from defending the corporation to achieving the best price for its stockholders. Id. at 182.

A. Revlon's best-price rule does not apply because there was not an inevitable bust-up.

In Time, the issue was whether Revlon duties applied to a friendly transaction that maintained Time's corporate practices. Paramount Communications, Inc. v. Time, Inc., 571 A.2d 1140, 1143-45. There, the directors accepted a lower bid in exchange for the assurances that Time's editorial integrity and journalistic focus would be preserved. Id. This Court held that Revlon duties were not triggered because Time did not face an inevitable bust-up. Id. at 1150. This allowed Time to accept a proposal that would maintain its corporate practices. Id.

Neither CFI nor Ravert Ward stated that BTRta would be broken up post-merger. Under Time, the Board was free to accept a proposal from the company that best maintained its environmental practices. The Board was concerned with CFI's history of logging operations in Brazil, Central America, and Indonesia. (Op. 3). Unlike CFI, Ravert Ward made assurances that BTRta's environmental policies would remain unaltered after the sale. (Op. 9). The Board chose a merger agreement which preserved BTRta corporate practices and did not violate its fiduciary duties. (Op. 9).

Appellee's argument loses focus of the fundamental corporate governance concerns at issue in Revlon. In Revlon, the narrow focus on best price in a bust-up was in response to the actions of self-dealing directors. Revlon's application here would force directors in all sales transactions to disregard legitimate corporate objectives in

pursuit of higher prices. Doing so would prevent directors from considering a transaction's impact on creditors, the community, or the environment. Fiduciary duties should not be confined to price in situations where the business judgment rule has traditionally applied.

B. The Board upheld its fiduciary duty of care because it properly limited its methods under Section 102(b)(7) and upheld its duty of loyalty by not engaging in self-dealing.

Corporations owe fiduciary duties of care and loyalty when selecting merger proposals. Malpiede v. Townson, 780 A.2d 1075, 1086 (Del. 2001). The duty of care requires directors to act prudently in evaluating the corporate merits of a decision by the board. Invanhoe Partners v. Newmont Min. Corp., 535 A.2d 1344, 1345 (Del. 1987). The duty of loyalty requires directors to refrain from acquiring benefits at the expense of the corporation and its shareholders. Id.

Section 102(b)(7) of the Delaware General Corporation Law specifically provides that corporations can limit or eliminate the personal liability of directors in their certificate of incorporation. Del. DEL. CODE ANN. TIT. 8, § 102(b) (2010). Thus, when challenged, the Board need only show that the methods by which it approved the Ravert Ward Agreement were reasonable.

In Malpiede, the Court examined whether allegations of a breach of the duty of care were barred by a liability limiting provision in the corporation's charter. Malpiede, 780 A.2d at 1095. This Court held the provisions permissible under Section 102(b)(7) to allow directors greater liberties in pursuing innovative business ventures. Id. at 1096.

BTRta's Certificate of Incorporation was adopted to enable its pursuit of socially and environmentally responsible business ventures. (Op. 6). Article II of its Certificate of Incorporation limits the board's liability for duty of care breaches by stating the factors that the Board may consider in making corporate decisions. (Op. 6). BTRta's Certificate of Incorporation also states that acceptance of a lower price offer "shall not be construed as a breach of a Director's fiduciary duty, even in the context of a Change in Control Transaction." (Op. 6).

Appellee's contend that this is the Board's attempt to limit its liability for breaches of the duty of loyalty. Appellee is correct that the duty of loyalty cannot be limited or eliminated under Section 102(b)(7). The statute clearly states that "provisions shall not eliminate or limit the liability of a director: (i) For any breach of the directors duty of loyalty to the corporation." tit. 8, § 102(b)(7). Thus, the lower court addressed this issue through a discussion of the Siegman v. Tri-Star Pictures, Inc.; however, it confused the duty of loyalty with the duty of care. (Op. 15).

In Siegman v. Tri-Star Pictures, Inc., directors sitting on both sides of a transaction breached their duty of loyalty in pursuit of personal gain. 1989 WL 48746, 232 (Del. Ch. 2009). The Chancery Court held invalid the directors' attempts to defer business opportunities from one company to the other. Id. at 238. The provision at issue allowed directors to increase their personal stock in one company at the expense of another. Id. The court explained that when directors appear on both sides of the transaction or engage in self-dealing they

breach their fiduciary duty of loyalty. Id. at 232, see, Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984). Like Revlon, Tri-Star was premised on a concern for protecting shareholders disadvantaged by self-dealing directors.

The present case does not present concerns of self-dealing on the part of the Board. (Op. 2). Seven of the nine members of The Board are independent and will not be involved Ravert Ward post merger. (Op. 4). Directors, Sunstein and Sarabhai, will not serve as members on Ravert Ward's board. They will act only as independent consultants for Ravert Ward in its implementation of BTRta's environmentally responsible practices. (Op. 11). Thus, Chancery Court erred in applying Tri-Star in the absence of self-dealing where the business judgment rule as traditionally applied.

Second Question Presented

Whether BTRta's merger agreement with Ravert Ward was reasonable in relation to the threat posed. Alternately, whether this Court's decision in Omnicare, Inc. v. NCS Healthcare, Inc. should be overturned due to its application of the Unocal standard to deal protection devices.

Scope of Review

The opinion of the Court of Chancery of the State of Delaware is clearly wrong as to the validity of the Ravert Ward Agreement based on the inferences drawn and reasoning used therein. In reviewing the opinion of lower courts, this Court sits in review of both law and fact. Lank v. Steiner, 224 A.2d 242, 267 (Del. 1966). Where justice so requires, this Court may make its own findings and ignore those below. Id. Thus, the Board's conduct is subject to *de novo* review. Nixon v. Blackwell, 626 A.2d 1366, 1375 (Del. 1993). As to the propriety of the findings of fact, the reviewing court looks at the entire record and the sufficiency of evidence to test the propriety of those findings. Levitt v. Bouvieu, 287 A.2d 671, 673 (Del. 1972)

Merits of Argument

I. The Order granting the Preliminary Injunction should be reversed because the deal protection devices in the Ravert Ward Agreement were within a range of reasonableness to the threat posed.

The Ravert Ward Agreement satisfies the two-prong test for assessing the validity of deal protection devices under Omnicare, Inc. v. NCS Healthcare, Inc. The first prong requires that the Board had "reasonable grounds for believing that a danger to corporate policy and effectiveness existed." 818 A.2d 914, 935 (Del. 2003). Upon satisfying the first prong, the second requires that the Board's actions to have been "reasonable in relation to the threat posed." Id.

A. The Board had reasonable grounds to believe that a lack of suitable buyers threatened its ability to maintain BTRta's environmental policies.

In Unitrin, Inc. v. American General Corp., this Court addressed the directors' decision to reject a hostile offer due to an inadequate price and antitrust implications. 651 A.2d 1361, 1375 (Del. 1995). This Court held that the directors response to the threat was in good faith after conducting a reasonable investigation. Id. There, the directors hired an independent financial advisor to determine the adequacy of the hostile bid. Id. at 1369. The directors also consulted their legal counsel to determine potential antitrust consequences. Id. Upon concluding due diligence, the directors determined that the bid was not in the stockholders best interests. Id.

In the present case, the Board was concerned with the threat of losing a buyer where it was faced with a lack of alternatives. As in Unitrin, the Board undertook a thorough analysis before agreeing to deal protection devices requested by Ravert Ward. First, the Board hired Eberhard as their financial advisor to explore potential transactions. (Op. 8). Due to economic and financial uncertainties, BTRta received no expressions of interest for several months. (Op. 8). However, CFI emerged as a potential suitor in late summer. CFI's history of logging practices led to a concern that BTRta's environmental policies would not be maintained. (Op. 9). Concluding that Ravert Ward would be more likely to continue BTRta's environmentally friendly practices, they accepted the Ravert Ward Agreement. (Op. 12).

B. The deal protection devices used in the Agreement are not coercive or preclusive and are within a range of

reasonableness.

The lower court stated that Omnicare applied to the deal protection devices in the Ravert Ward Agreement. (Op. 16). This Court in Omnicare applied a two-part analysis to determine whether deal protection devices were reasonable in relation to a posed threat. Omnicare, 818 A.2d at 935. First, directors must establish that the deal protection devices were not so coercive or preclusive as to be considered "draconian" by a court. Id. at 932. This asks whether the deal protection devices are "actionably" coercive or preclusive. Weiss v. Samsonite Corp., 741 A.2d 366, 372 (Del. Ch.), aff'd, 746 A.2d 277 (Del. 1999). Coercion has the effect of forcing upon stockholders a board initiated alternative to a hostile offer. Paramount Communications, Inc. v. Time Inc., 571 A.2d 1140, 1154 (Del. 1989). Preclusion exists when stockholders are deprived of the right to receive superior proposals. Id. Second, directors must demonstrate that their actions were within a "range of reasonable responses" to the threat perceived. Omnicare, 818 A.2d at 932.

(1) The deal protection devices are not coercive or preclusive because the board did not breach its fiduciary duties.

In Omnicare, this Court invalidated a combination of deal protection devices making it mathematically impossible for the directors to consider superior proposals. 818 A.2d at 936. The agreement contained a voting lock-up, a force the vote provision, and a termination fee. Id. at 925-26. Breaching the voting agreements was not possible because they were specifically enforceable by Genesis. Id. at 926. Thus, the termination fee proved ineffective. Id. The directors could not fulfill their fiduciary duties because the voting

agreements precluded consideration of superior proposals. This Court concluded that the agreement was unreasonable. Id. at 938-39.

Here, the Board complied with its fiduciary duties because it remained free to accept a superior proposal. (Op. 12). The Ravert Ward Agreement contained a voting lock-up, a termination fee, a force the vote provision, and a no-shop clause. (Op. 12). The record does not permit a determination as to whether the voting agreement constituted a complete lock-up. (Op. 5-6). Because the voting provisions were not specifically enforceable, the Board remained free to breach the Agreement subject to the termination fee. (Op. 12).

(2) The deal protection devices were within the range of reasonableness as the board's response balanced securing a buyer with maintaining its corporate objectives.

This Court in Omnicare did not analyze whether the directors' response was "within a range of reasonableness" upon finding the deal protection devices coercive and preclusive. 818 A.2d at 935. However, subsequent decisions explain what qualifies as a reasonable range under Omnicare.

In re OPENLANE, Inc. held reasonable deal protection devices implemented to protect a transaction determined beneficial by directors. 2011 WL 4599662, 10 (Del. Ch. 2011). Directors concerned with being left with no potential buyer agreed to a non-solicitation clause. Id. However, they maintained their ability to consider superior offers and remained free to terminate the agreement. Id. The court found the deal protection devices reasonable based upon the directors determination that the merger was in the best interests of the company. Id.

The Ravert Ward Agreement presented directors with a choice between the loss of their corporate identity and the risk of being abandoned by its only potential suitors. Ravert Ward was a company with a reputation as a leading organizer of socially responsible corporate acquisitions. (Op. 10). The Board approved a transaction with a company that would continue BTRta's environmentally conscious practices. It was within the range of reasonable responses for the Board to strike a balance between its financial and societal goals in approving the Ravert Ward Agreement.

II. Omnicare should not have used the Unocal standard to analyze the reasonableness of deal protection devices. Directors' decisions to implement deal protection devices should be granted deference under the business judgment rule.

In Unocal Corp. v. Mesa Petroleum, Co., this Court addressed the validity of deal protection devices adopted to prevent stockholders from considering a hostile tender offer. 493 A.2d 946, 949 (Del. 1985). Concerned about the "omnipresent specter that a board may be acting primarily in its own interest," this Court formulated a two-pronged test for determining the validity of board adopted deal protection devices. Id. at 954. The first prong is a reasonableness test, satisfied where directors demonstrate reasonable grounds for believing that a threat to corporate policy exists. Id. at 955. The second prong is a proportionality test, which is satisfied by demonstrating that the directors' defensive response was reasonable in relation to the posed threat. Id.

Unitrin likewise discussed the issue of director adopted deal protection devices aimed at preempting a hostile bidder. 651 A.2d at

1370. This Court expanded the Unocal standard reasoning that a more thorough analysis was necessary where directors were suspected of entrenchment. Thus, in hostile transactions where director self-dealing is at issue, the reasonableness inquiry asks whether deal protection devices are "actionably" coercive or preclusive. Weiss, 741 A.2d at 372.

Nearly a decade later, Omnicare applied the same test to a friendly transaction between two companies not engaged in self-dealing. 818 A.2d 914. In Omnicare, the NCS directors' faced the threat of Genesis walking away from the deal, leaving NCS with no prospective buyer. Id. NCS was the only interested acquirer, so self-dealing was not at issue where: NCS would control the resulting entity, Omnicare's directors gained nothing from the merger, and the deal protection devices required for Genesis to commit to the transaction. Id. at 947.

In applying the Unocal standard, Omnicare's second holding announced that "deal protection devices that are preclusive or coercive are always unreasonable". Id. at 932. However, the application of the Unocal standard conflicts with the policy behind its creation: the concern that a board is acting in its own interest to the detriment of shareholders. Id. at 954. As was the case before Omnicare, decisions by a disinterested board dealing in good faith should not be subjected to review under Unocal. In applying Unocal out of context, Omnicare led this Court to conclude that the deal protection devices were unreasonable despite the board's good faith intentions and the benefits accruing to stockholders.

Where self-dealing on the part of the directors is not at issue and the transaction is not a hostile one, the court should apply the business judgment rule.

Conclusion

This Court should find that the Ravert Ward merger agreement did not trigger Revlon's enhanced scrutiny, thus allowing the Board to accept a proposal that sustained its corporate practices without breaching its fiduciary duties of care and loyalty. Since Revlon duties are not triggered by the merger, this Court should find that the deal protection devices in the Ravert Ward Agreement were reasonable in relation to the threat posed. Alternately, this Court should overturn Omnicare's use of the Unocal standard when addressing deal protection devices and instead grant deference to the Board's decisions under the business judgment rule.