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. STERN, WILLIAM D. HEMPHILL, RAVERT WARD L.P., AND BTR ACQUISITION CORP.,	)	
Defendants Below, Appellants,	)	Civil Action No. 142, 2012
v.	)	
CONSOLIDATED FOREST INDUSTRIES CO., a Delaware corporation,	)	On Appeal from the Court of Chancery of the State of Delaware
Plaintiff Below, Appellee.	)	

APPELLANTS' OPENING BRIEF

Law Firm C
Attorneys for Defendants Below, Appellants

Date Filed: February 10, 2012

TABLE OF CONTENTS

TABLE OF CITATIONS iii

NATURE OF PROCEEDINGS 1

SUMMARY OF ARGUMENT 2

STATEMENT OF FACTS 3

ARGUMENT 7

I. ARTICLE II IS VALID AS A MATTER OF LAW 7

A. Question Presented 7

B. Standard of Review 7

C. Merits of Argument 7

1. The Court of Chancery improperly held that Article II is contrary to Section 102(b)(7) and the laws of the State of Delaware 7

2. The Court of Chancery improperly held that the board breached its fiduciary duty of care under *Revlon* ... 11

II. THIS COURT SHOULD OVERRULE *OMNICARE* BECAUSE THE DECISION FAILS TO PROVIDE A WORKABLE STANDARD AND HAS SIGNIFICANTLY LOST ITS "LEGAL VITALITY" WITHIN THE CONTEXT OF MERGER AGREEMENTS 15

A. Question Presented 15

B. Standard of Review 15

C. Merits of Argument 15

1. The Omnicare decision "defies workable practicability" because the ability for courts to broadly scrutinize "lock-up" provisions not only circumvents the business judgment rule but also destroys any certainty of consummating a corporate merger 17

a. The *Omnicare* Rule 17

b. The importance of the business judgment rule .. 17

c. Omnicare deters consummations of good faith mergers 19

2. There has been no justifiable reliance on *Omnicare*, and in reality, principles of law have evolved to render the *Omnicare* decision limited in its use.... 21

3. Society has changed as to have taken away the significance of *Omnicare*'s application..... 24

4. *Omnicare* has lost its legal vitality..... 24

CONCLUSION..... 25

TABLE OF CITATIONS

United States Supreme Court

Planned Parenthood of Southeastern Pennsylvania v. Casey,
505 U.S. 833 (1992) 16, 17

Delaware Supreme Court

Kaiser Aluminum Corp. v. Matheson,
681 A.2d 392 (Del. 1996) 7

Kasung v. Cole Nat'l Corp.,
884 A.2d 500 (Del. 2005) 7, 15

Providence & Worcester Co., v. Baker,
378 A.2d 121 (Del. 1977) 7, 8, 10

Waggoner v. Laster,
581 A.2d 1127 (Del. 1990) 9

Paramount Commc'ns. Inc. v. QVC Network Inc.,
637 A.2d 34 (Del. 1994) 11, 12, 13

Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.,
506 A.2d 173 (Del. 1986) 11, 12, 14

Unocal Corp. v. Mesa Petroleum Co.,
493 A.2d 946 (Del. 1985) 15, 18

Omnicare, Inc. v. NCS Healthcare, Inc.,
818 A.2d 914 (Del. 2003) 15, 17, 18, 19, 20

Travelers Indem. Co. v. Lake,
594 A.2d 38 (Del. 1991) 16, 17, 25

Sinclair Oil Corp. v. Levien,
280 A.2d 717 (Del. 1971) 17

Smith v. Van Gorkom,
488 A.2d 858 (Del. 1985) 18

Cheff v. Mathes,
199 A.2d 548 (Del. 1964) 19

Paramount Communications, Inc. v. Time, Inc.,
517 A.2d 1140 (Del. 1989) 20

Delaware Court of Chancery

Consol. Forest Indus., Co. v. BTRta Forest Prods., Inc.,
No. 6943-CJ, slip op.,
(Del. Ch. Jan. 26, 2012)..... 8, 9, 10, 13, 14

Siegman v. Tri-Star Pictures, Inc.,
No. 9477, 1989 WL 48746,
(Del. Ch. May 5, 1989, revised May 30, 1989)..... 10

Orman v. Cullman,
No. Civ.A.18039, 2004 WL 2348395,
(Del. Ch. Oct. 20, 2004)..... 21, 22

Optima International of Miami v. WCI Steel, Inc.,
(Del. Ch. June 27, 2008)(No. 3833-VCL)..... 17, 18

Other Cases

Monty v. Leis,
123 Cal.Rptr.3d 641 (Cal. Dist. Ct. app. 2011).....24

Orders

Order of Interlocutory Appeal,
BTRta Forest Prods., Inc. v. Consol. Forest Indus. Co., appeal docketed, No. 142, 2012 (Feb. 10, 2012)..... 7

Statutes

DEL. CODE ANN. tit. 8, § 102(b)(1)(2011)..... 7

DEL. CODE ANN. tit. 8, § 102(b)(7)(2011)..... 7

DEL. CODE ANN. tit. 8, § 141(a)(2011)..... 18

Secondary Authorities

Steven J. Haymore, *Publicly Oriented Companies: B Corporations and the Delaware Stakeholder Provision Dilemma*,
64 VAND. L. REV. 1311 (2011)..... 12

Justin W. Oravetz, *Is a Merger Agreement Ever Certain? The Impact of the Omnicare Decision on Deal Protection Devices*,
29 DEL. J. CORP. L. 805 (2004)..... 16

Jay H. Knight, *Merger Agreements Post-Omnicare: How the Delaware Supreme Court Pulled the Plug on "Mathematical Lock-Ups,"*
31 N. KY. L. REV. 29 (2004)..... 20, 24

NATURE OF PROCEEDINGS

On December 16, 2011, Petitioner Consolidated Forest Industries Company ("CFI") filed suit in the Court of chancery of the State of Delaware against the directors of BTRta Forest Products Incorporated (collectively, "Director Defendants"), Ravert Ward L.P. ("Ravert Ward"), and BTR Acquisition Corporation ("BTR") alleging that they breached their fiduciary duties by rejecting its merger proposal under Delaware law. *Consol. Forest Indus., Co. v. BTRta Forest Prods., Inc.*, No. 6943-CJ, slip op. at 13, (Del. Ch. Jan. 26, 2012). On January 23, 2012, following limited and expedited discovery, petitioner CFI moved for entry of a preliminary injunction against consummation of a triangular merger between BTRta and Ravert Ward's subsidiary BTR. Three days later, the Court of Chancery granted the petitioner CFI's motion for entry of a preliminary injunction against the Director Defendants, Ravert Ward, and BTR.

Pursuant to Delaware Supreme Court Rule 42, the Court of Chancery certified Defendants' application for interlocutory appeal on February 3, 2012. Notice of Appeal From Interlocutory Order, *BTRta Forest Prods., Inc. v. Consol. Forest Indus. Co.,* (Feb. 6, 2012). On February 10, this Court accepted Defendants' interlocutory appeal. Order of Interlocutory Appeal, *BTRta Forest Prods., Inc. v. Consol. Forest Indus. Co., appeal docketed*, No. 142, 2012 (Feb. 10, 2012).

SUMMARY OF ARGUMENT

This Court should reverse the Court of Chancery's grant of a preliminary injunction because Petitioner has not established a reasonable probability of success on the merits. First, Article II is valid as a matter of law. The Court of Chancery improperly held that Article II is contrary to Section 102(b)(7) and the laws of the State of Delaware because Article II does not limit the duty of loyalty owed to the stockholders. Furthermore, the lower court improperly decided that BTRta breached its fiduciary duty of care under *Revlon*; the court should have applied the standard defined in Article II establishing the stockholders' "best interests" in a change of control transaction rather than the "one-size fits all" standard articulated in *Revlon* that considers only monetary interests.

Second, this Court should overrule *Omnicare* because the decision fails to provide a workable standard and has also lost its legal vitality within the context of merger agreements. The majority in *Omnicare* erroneously created a new bright line rule to automatically invalidate protection provisions in merger agreements that mathematically "lock-up" mergers. This new rule poses numerous problems: it undermines the business judgment rule, deters corporations from consummating mergers, and produces unpredictable and inconsistent decisions.

STATEMENT OF FACTS

At issue in this case is the validity of a merger agreement between BTṚta and Ravert Ward; CFI has moved for a preliminary injunction against its consummation. *Consol. Forest Indus., Co.*, No. 6943-CJ, slip op. at 13. Defendant BTṚta is incorporated in Delaware and has its principal place of business in Portland, Maine. *Id.* at 2, 4. Its products include specialty papers, specialty chemicals derived from trees, and sustainably harvested lumber. *Id* at 4. Defendants Matthew Sunstein and Vikram Sarabhai are the founders of BTṚta and are share a passion for both engineering and environmentalism. *Id.* They applied these interests to creating a business to using sustainably harvested trees, and otherwise minimizing adverse environment impact of production, to manufacture and sell forest products. *Id.*

Defendant Ravert Ward is a boutique acquisition firm, specializing in arranging private acquisitions of smaller public companies, based in Haverhill, Massachusetts. *Id.* at 4. Defendant BTR Acquisition Corporation is the acquisition company established by Ravert Ward for the purposes of the challenged merger with BTṚta. *Id.* Petitioner CFI is a Delaware corporation headquartered in Boise, Idaho and has become one of the world's largest producers of paper and wood products. *Id* at 3. Its common stock trades on the New York Stock Exchange. *Id.*

BTṚta engaged in an initial public offering of Class A common stock in late 2000; those shares have traded on the Nasdaq Stock Market in the range of $13 to $14 per share before the events giving rise to this litigation. *Id.* at 5. BTṚta's certificate of

incorporation provides for two classes of common stock: Class A and Class B. *Id.* Both classes have identical rights, except that Class B common stock is entitled to ten votes per share in all matters on which the common stock votes, while Class A common stock carries only one vote per share. *Id.* All of the Class B stock is owned by Sunstein, Sarabhai, and their families, which constitutes about 50.4% of BTṚta's voting power. *Id.*

Frustrated with not being able to attend to what they considered to be important aspects of their business, Sunstein and Sarabhai retained Eberhard Jefferson L.P. ("Eberhard") as BTṚta's financial advisor to explore potential mergers or acquisitions to address their concerns. *Id.* at 7-8. On May 18, 2011, Sunstein, Sarabhai, and the board of directors began the process of identifying and eliciting bids to acquire the entire equity of BTṚta's Class A and Class B stocks. *Id.* at 8. Despite economic uncertainties, CFI presented a proposal to acquire BTṚta through a merger at a price of $16.50 per share in late September 2011. *Id.* at 8-9. However, Sunstein and Sarabhai were both considerably concerned about CFI's history of logging and its credibility of committing to environmentally responsible practices. *Id.* at 9. Consequently, CFI assured Sunstein and Sarabhai consultant positions regarding CFI's environmental practices, and further increased its offer to $17 per share. *Id.*

On October 17, 2011, the BTṚta board of directors approved the merger agreement with CFI that included a termination provision allowing BTṚta to seek out a Superior Proposal during the sixty-day period following the board's approval. *Id.* at 9-10. Under the

merger agreement, a "Superior Proposal" meant any proposal that BTRta's board of directors deemed in good faith would better serve the "best interests" of the company, as defined under Article II of BTRta's certificate of incorporation. *Id.* at 10. Article II defines "best interests" as not only the long-term prospects and interests of the company and its stockholders, but also the social, economic, legal, or other effects of any action on the current and retired employees, suppliers, and customers of the company, together with the effect of the company's operations on the environment, economy of those communities, and the larger world. *Id.* at 6. Article II was also discussed in the prospectus for the Class A common stock offering under the heading describing "Risk Factors." *Id.* at 7.

Still concerned with their ability to promote BTRta's environmental interests, Sunstein and Sarabhai took advantage of the sixty-day period to seek out and enter into a Superior Proposal. *Id.* at 10. Subsequently, Eberhard put them in touch with Ravert Ward, a buy-out firm focused on corporate social responsibly. *Id.* Although Ravert Ward's initial offer was only $13 per share, after a series of meetings and negotiations, it ultimately agreed to offer $15.50 per share. *Id.* at 11. While this price was less than CFI's offer of $17 per share, it was still a premium over the pre-merger agreement price of BTRta stock. *Id.* Moreover, Ravert Ward assured BTRta that its operations would continue to be managed in accordance with its previously environmentally responsible practices and Sunstein and Sarabhai would have an active consulting role in implementing that commitment. *Id.* However, in order to make these concessions, Ravert

Ward insisted that: (1) Sunstein and Sarabhai vote all of their Class B shares in favor of the merger; (2) they present the agreement to a vote of its stockholders on or before April 1, 2012; (3) BTṚta not solicit any competing merger proposals prior to the vote; and (4) there would be a termination fee of $15 million. *Id.* at 12.

On December 13, 2011, the board met to consider the Ravert Ward merger and concluded that it was substantially more likely that BTṚta's environmentally responsible practices would continue, and would even evolve, following an acquisition by Ravert Ward than that by CFI. *Id.* Weighing that consideration, the interests of the communities and society served by BTṚta, as provided in Article II, and recognizing that the Ravert Ward merger agreement still offered stockholders a premium to pre-merger prices, the board declared the Ravert Ward merger agreement a Superior Proposal within the meaning of the CFI merger agreement. *Id.* That day, BTṚta informed CFI of the Ravert Ward merger, which resulted in CFI promptly bringing suit in order to enjoin the consummation of the merger. *Id.* at 13.

ARGUMENT

I. ARTICLE II IS VALID AS A MATTER OF LAW.

A. Question Presented

Whether the lower court erred by granting a preliminary injunction when it held that (1) Article II is contrary to the laws of the State of Delaware; and (2) the board breached their fiduciary duty of care under *Revlon*.

B. Standard of Review

The decision to grant or deny a preliminary injunction requires the trial court to consider whether the moving party has established: (1) a reasonable probability of success on the merits; (2) irreparable harm; and (3) a balance of equities in its favor. *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 394 (Del. 1996). Once the Court of Chancery's factual findings are established, this Court will review issues of law *de novo*. *Kasung v. Cole Nat'l Corp.*, 884 A.2d 500, 508 (Del. 2005).

C. Merits of Argument

1. The Court of Chancery improperly held that Article II is contrary to Section 102(b)(7) and the laws of the State of Delaware.

Article II is valid under Delaware law because it expands the duties of the board in compliance with Section 102(b)(1) and is not contrary to any other laws of the State, including Section 102(b)(7). *See* DEL. CODE ANN. tit. 8, § 102(b)(1) (2011); DEL. CODE ANN. tit. 8, § 102(b)(7) (2011); *Providence & Worcester Co., v. Baker*, 378 A.2d 121, 124 (Del. 1977). Section 102(b)(1) of the Delaware General Corporation Law allows the powers and duties of directors to be

expanded or restricted by the provisions of the certificate of incorporation as long as they are not contrary to the laws of Delaware. tit. 8, § 102(b)(1). In this case, the duties of the board of directors were expanded, and thus are not inconsistent with Delaware law, but rather, equal to or greater than the duties imposed upon directors by Delaware law. Article II of BTŖta's certificate of incorporation includes a provision stating that when discharging the duties of a director, and 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 stockholders, and the social, economic, legal, or otherwise effects of any action on the current and retired employees, the suppliers and customers of the Company or its subsidiaries, and the communities and society in which the Company or subsidiaries operate, (collectively, with the stockholders, the "Stakeholders"), together with the short-term, as well as long term, interest of its stockholders and the effect of the Company's operations (and its subsidiaries' operations) on the environment and the economy of those communities and the larger world.

Consol. Forest Indus., Co. v. BTŖta Forest Prods., Inc., No. 6943-CJ, slip op. at 6, (Del. Ch. Jan. 26, 2012). Therefore, Article II provides a detailed, straightforward definition of "best interests" that the board can easily apply. Furthermore, both provisions also include a declaration that any director is entitled to rely upon the definition of "best interests," even in a change in control context, where as a result of weighing other stakeholder's interests, a director accepts an offer with a lower price per share than a competing offer, and that it would not be a breach of the director's fiduciary duty. *Id.* at 6, 7. As defined elsewhere in BTŖta's

articles of incorporation, a "change in control transaction" includes a merger in which the company's stock is converted into the right to receive cash. *Id.* at 6. Thus, the BTRta directors effectively expanded the duties of the board in a matter consistent with Delaware law.

Since Article II is a contract among stockholders, the stockholders have accepted and are bound to the definition of "best interests." *See Waggoner v. Laster*, 581 A.2d 1127, 1134 (Del. 1990). Under Delaware law, a certificate of incorporation is seen as a contract among stockholders or between stockholders and the corporation. *Id.* Additionally, BTRta made this definition of "best interests" available again when it disclosed "risk factors" associated with the Class A Common Stock in the prospectus for its initial offering, by including the provisions of Article II and explaining its importance. *Consol. Forest Indus., Co.*, No. 6943-CJ, slip op. at 6. All of the BTRta stockholders had access to both the prospectus and Article II before deciding to invest in the corporation. Therefore, those who chose to invest with BTRta approved of the provisions laid out in Article II have accepted the definition of "best interests" provided as representing the interests they agreed to be considered in a change of control transaction.

In deciding to invalidate Article II, the lower court reasoned that a charter provision that would alter the directors' fiduciary duty of loyalty in acting on a merger proposal is proscribed under Section 102(b)(7). *Id.* at 15. It relied on an unpublished opinion in which the court found that a charter provision that could limit

director liability for usurpation of a corporate opportunity would be inconsistent with Section 102(b)(7). *Id.* (citing *Siegman v. Tri-Star Pictures, Inc.*, No. 9477, 1989 WL 48746, at *236 (Del. Ch. May 5, 1989, revised May 30, 1989)). However, this issue is not relevant and can be distinguished in the present case. The BTRta directors did not limit their fiduciary duty of loyalty in enacting Article II; they expanded and defined it. As already stated, Article II provides a clear definition of the "best interests" of the stockholders and the corporation that the stockholders have agreed to. By allowing the stockholders, and not the courts, to define "best interests," the board of directors has an affirmative obligation to abide by Article II in a change in control transaction. *See Consol. Forest Indus., Co.*, No. 6943-CJ, slip op. at 6. Article II clearly defines the "best interests" of the stockholders and the corporation, and as long as the directors follow it in a change in control transaction, they have satisfied their duty of loyalty. Ultimately, the directors remain liable for any breach of the duty of loyalty, and thus *Siegman* is not applicable.

This Court has held that Section 102(b)(1) authorizes a charter provision of a certificate of incorporation that does not otherwise violate Delaware law. *See Providence & Worcester Co.,* 378 A.2d at 124 (holding that a provision of the certificate of incorporation that does not violate another section of Delaware law is authorized by Section 102(b)(1)). Therefore, since Article II is not otherwise contrary to the laws of the State of Delaware, including the fiduciary duties requirement under Revlon, it is authorized under Section

102(b)(1) and valid as a matter of law and Petitioner does not have a reasonable likelihood of success on the merits.

2. The Court of Chancery improperly held that the board breached its fiduciary duty of care under *Revlon*.

The board did not breach its fiduciary duty of care because it reasonably informed itself of all material information available and obtained the best value for its stockholders as defined in Article II. *See Paramount Commc'ns. Inc. v. QVC Network Inc.*, 637 A.2d 34, 45 (Del. 1994). The most important task presented to a board of directors is that of managing the business and affairs of its corporation. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 179 (Del. 1986). The directors owe fiduciary duties of care and loyalty to the corporation and its stockholders. *Id.* These principles apply as equally in day-to-day business as they do when the board approves a corporate merger proposal. *Id.*

Under the standard created by *Revlon*, once it is clear that a corporation is for sale, the board of directors' duty changes from the preservation of the entity to the maximization of the company's value at a sale for the stockholders' benefit. *Id.* at 182. Traditionally, Delaware courts have interpreted this to mean that it is in the stockholders' "best interests" to receive the best price possible per share, and that the directors are responsible for obtaining it. *Id.* However, this is not the only explanation of the stockholders' "best interests," and directors should not be limited to it in their analyses when the articles of incorporation prescribe a different definition.

Neither *Revlon*, nor any of the corporations that have been sued for breach of *Revlon* duties since, have had a charter provision placing an affirmative obligation on directors to consider non-shareholder interests. Steven J. Haymore, *Publicly Oriented Companies: B Corporations and the Delaware Stakeholder Provision Dilemma*, 64 VAND. L. REV. 1311, 1334-35 (2011). In the present case, BTRta has effectively conveyed an appropriate, workable standard that the Court should use to evaluate whether or not the board breached its fiduciary duties, rather than the "one-size fits all" standard articulated by *Revlon*.

This Court has reasoned that in determining the best value for the stockholders, a board of directors is not limited to considering only the amount of cash involved; the directors should instead analyze the entire situation presented as a whole. *Paramount Commc'ns. Inc.*, 637 A.2d at 44. Furthermore, the board may assess a variety of factors, including the bidder's business plans for the corporation and their effects on stockholder interest. *Id.* Finally, only when the directors have informed themselves of all material information reasonably available, must they decide which alternative is going to offer the best value reasonably available for the stockholders. *Id.* at 45.

When Defendants Sunstein and Sarabhai decided to pursue a merger, a change in control was apparent and *Revlon* duties were triggered. *See Revlon, Inc.*, 506 A.2d at 182. Although they initially accepted a merger agreement with CFI, it included a provision that allowed termination if a Superior Proposal was received, including any merger

proposal that the BTRta's board of directors deemed in good faith would better serve the "best interests" of the company as defined in Article II of the certificate of incorporation. *Consol. Forest Indus., Co.*, No. 6943-CJ, slip op. at 10. Although the Ravert Ward proposal only offered $15.50 per share, less than CFI's proposal of $17 per share, Ravert Ward assured defendants that BRTta's operations would continue to be managed in accordance with its environmentally responsible practices. *Id.* at 11.

Although CFI's proposal offered a greater monetary value per share, Defendants were concerned with the size of its operations and its history of logging practices, which minimized its credibility to maintain the environmentally responsible practices of BTRta, one of the articulated interests to consider under Article II. *Id.* at 9. The board weighed this consideration, along with the interests of the communities and society served by the company, as provided in Article II, with the recognition that this merger still offered stockholders a premium to pre-merger prices, and concluded the Ravert Merger proposal a Superior Proposal as defined in the CFI merger agreement. *Id.* at 12. This outcome is valid under Delaware law because the board informed themselves of all material information reasonably available, and used it in deciding that the Ravert Ward Merger was going to offer the best value reasonably available for the stockholders as defined under Article II. *See Paramount Commc'ns. Inc.*, 637 A.2d at 45.

The lower court reasoned that Section 102(b)(7) does not allow the directors to alter their duty of care by promoting broader social interests at the expense of the stockholders' interests, and held that

Defendants breached their fiduciary duty of care by relying on the provisions set forth in Article II. *Consol. Forest Indus., Co.*, No. 6943-CJ, slip op. at 15-16. However, Article II does not limit the directors' duty of care; on the contrary, it effectively expands it beyond the requirements imposed by *Revlon*.

It is clear in this case that the board of directors knew what was in the "best interests" of the company and the stockholders since the contractual definition of "best interests" is laid out in Article II. Furthermore, the affirmative obligation prescribed in Article II is actually a *higher standard* than is set forth in *Revlon*. While *Revlon* only requires the best possible price per share in the duty of care analysis, Article II goes further and mandates that the board consider a much broader set of considerations, collectively the "best interests" that the stockholders have accepted. By including Article II in the articles of incorporation, BTRta effectively discharged the duty of care as set forth in *Revlon* by allowing stockholders to define "best interests" for themselves and not leave it up to the courts' "one-size fits all" definition, which BTRta's stockholders rejected.

Revlon stands for the proposition that money is usually a stockholder's best interest; however, when evidence to the contrary exists, the Court should take that into consideration when evaluating the board's actions. *See Revlon, Inc.*, 506 A.2d at 182. Neither *Revlon*, nor any cases that have applied Revlon duties since, have had a charter provision placing an affirmative obligation on directors to consider non-stockholder interests. Haymore, *supra*, at 1334-35. This Court has realized that corporate law is not static; it must grow and

develop in response to, and in anticipation of, evolving concepts and needs. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 957 (Del. 1985). In consideration of this policy concern, this Court should recognize that corporations and stockholders have an interest in defining what constitutes the best value for themselves in a change of control transaction. *See Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 947 (Del. 2003). Therefore, this Court should reverse the Court of Chancery's grant of a preliminary injunction because Petitioner has not established a reasonable probability of success on the merits.

II. THIS COURT SHOULD OVERRULE *OMNICARE* BECAUSE THE DECISION FAILS TO PROVIDE A WORKABLE STANDARD AND HAS SIGNIFICANTLY LOST ITS "LEGAL VITALITY" WITHIN THE CONTEXT OF MERGER AGREEMENTS.

A. Question Presented

Whether *Omnicare*'s enhanced scrutiny standard on merger protection devices that mathematically lock-up mergers undermines the business judgment rule and fails to provide an applicable and workable standard in the midst of the changing complexities of corporate mergers.

B. Standard of Review

As previously stated in Part I, this Court must give deference to the Court of Chancery's factual findings. However, questions of law are subject to *de novo* review. *Kasung*, 884 A.2d at 508 (Del. 2005).

C. Merits of Argument

This Court should overrule *Omnicare* because the decision fails to provide a workable standard and has significantly lost its legal "vitality" within the context of corporate mergers and deal protection

agreements. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854-55 (1992); *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 46 (Del. 1991). Under the majority's holding in *Omnicare*, a target corporation's board of directors can no longer enjoy the protection of the business judgment rule when negotiating terms of the transaction. Justin W. Oravetz, *Is a Merger Agreement Ever Certain? The Impact of the Omnicare Decision on Deal Protection Devices*, 29 DEL. J. CORP. L. 805, 842 (2004). Effectively, *Omnicare* allows courts to step into the boards' shoes and second guess their business decisions. Not only does this confusion undermine predictability grounded on prior Delaware precedent, but will also undercut a board's power to negotiate merger terms in the best interest of its corporation.

Overruling a past decision is by no means an easy process, and this Court should certainly tread carefully when doing so. However, this Court has clearly expressed that it cannot ignore its duty to change and participate in the growth of law to ensure that decisions are uniform and predictable. *Travelers*, 594 A.2d at 46. The Supreme Court of the United States established a reliable inquiry based framework when courts are presented with opportunities to reevaluate its prior decisions. *Casey*, 505 U.S. at 854-55. For instance, the Supreme Court in *Casey* opined that a reexamination of a prior holding should be based on a series of four "prudential and pragmatic" inquiries and measure the consequences of overruling the holding. *Id.* The inquiries include (1) whether the rule defies "practical workability;" (2) whether the rule is subject to reliance in that it

would cause special hardship if overruled; (3) whether the principles of law have evolved to render the old rule limited in its use; and (4) whether facts have changed as to have taken away the old rule of significant application. *Id.* These "pragmatic" inquiries advance the underlying question that this court asks before overruling a decision: has the rule lost its legal vitality? *Travelers*, 594 A.2d at 46.

1. The *Omnicare* decision "defies workable practicability" because the ability for courts to broadly scrutinize "lock-up" provisions not only circumvents the business judgment rule but also destroys any certainty of consummating a corporate merger.

a. The *Omnicare* Rule.

The majority in *Omnicare* held that an enhanced scrutiny standard applies to merger protection devices under *Unocal* and *Unitrin*, and will further find provisions that mathematically lock-up mergers to be *per se* invalid because directors are blatantly violating their fiduciary duties by entering into these agreements. *See Omnicare*, 818 A.2d 939. The Court reasoned that it must protect the rights of minority shareholders. *Id.* at 937. Thus, the *Omnicare* majority judicially created a "third rail" that has now become one of the "rules of the game." *Id.* at 943 (Veasey, C.J. and Steele, J., dissenting).

b. The importance of the business judgment rule.

Omnicare fails to provide a workable standard because it allows courts to bypass a question that should be asked before scrutinizing a board's business decision: do any indications of self-dealing and lack of care exist? *See Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971). Derived from a board's fundamental duty to protect the

corporate enterprise, the business judgment rule is a "presumption that making business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the company." *See* DEL. CODE ANN. tit. 8, § 141(a) (2011); *Unocal*, 493 A.2d at 955. This rule exists to protect and encourage the "full and free exercise of the managerial power granted to Delaware directors." *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985). The hallmark of the rule is that courts will not substitute its judgment for that of the board's. *Sinclair Oil Corp.*, 280 A.2d at 720.

Absent evidence of a board of director's self-interest or lack of care, the business judgment rule should apply when courts examine the validity of merger agreement provisions. *See Omnicare*, 818 A.2d at 947 (Veasey, C.J. and Steele, J., dissenting). In *Omnicare*, the majority erroneously expanded well-established Delaware precedents (i.e. *Unitrin* and *Unocal*) to establish a bright line rule that would be applied in all lock-up mergers. *See id.* at 943. The majority in *Omnicare* held that a corporate merger agreement "entered into after a market search, before any prospect of a topping bid has emerged, which locks up stockholder approval and does not contain a 'fiduciary out' provision, is *per se* invalid when a later significant topping bid emerges." *Id.* at 942. Chief Justice Norman Veasey and Justice Myron Steele expressed deep-seated concerns with the majority's implementation of this bright line rule. *See id.* at 943. The dissent reasoned that like any other business decision, mathematical lock-ups in a merger agreement must be examined in its entirety, including the

decisions that the board weighed before the merger. *Id.* at 941. Chief Justice Veasey articulated that the "Court should review the entire bidding process to determine whether the independent board's actions permitted the directors to inform themselves of their available options and whether they acted in good faith." *Id.*

Here, absent any signs of substantive and procedural bath faith and self-interest, the onus is on CFI to show that the BTŖta directors violated their fiduciary duties when they negotiated the lock-up terms with Ravert Ward. The BTŖta directors should not be penalized for agreeing to lock-up terms with Ravert ward (even if it turns out to be a mistake), if the decision appeared reasonable at the time the decision was made. *See Cheff v. Mathes*, 199 A.2d 548, 555 (Del. 1964). Despite Sunstein and Sarabhai voting all of their shares of Class B stock and mathematically locking up the Ravert Ward merger, the board reasonably concluded that BTŖta's environmental practices was substantially more likely to continue, evolve, and grow with Ravert Ward. Therefore, the *Omnicare* decision would erroneously require a court to scrutinize BTŖta's merger agreement.

c. *Omnicare* deters consummations of good faith mergers.

The *Omnicare* decision fails to provide a workable standard because it effectively undermines an acquiring corporation's ability to curtail third parties from interfering with a merger during the time period between its agreement with the target corporation and a stockholder vote. *See Omnicare*, 818 A.2d at 948 (Veasey, C.J. and Steele, J., dissenting). For instance, an acquirer would want to assure its merger with the target company by agreeing to deal

protection provisions perhaps due to significant due diligence costs, fees for financial advisors, legal fees, management time, and lost business opportunities. Jay H. Knight, *Merger Agreements Post-Omnicare: How the Delaware Supreme Court Pulled the Plug on "Mathematical Lock-Ups,"* 31 N. KY. L. REV. 29, 31 (2004). On the other side of the coin, a target corporation may want to thwart third parties from interfering because of unique business opportunities that cannot be matched by another corporation. *See Paramount Communications, Inc. v. Time, Inc.*, 517 A.2d 1140, 1152 (Del. 1989). By installing a trip-wire to automatically trigger an enhanced scrutiny standard whenever corporations enter lock-up merger agreements without fiduciary out clauses, courts are perpetuating an uncertain and unpredictable standard. Here, BTRta wanted to protect their corporate identity and in good faith strengthen the certainty of its merger with Ravert Ward by agreeing to specific protection devices. Without these lock-up provisions, Ravert Ward would have been reluctant to further sink transaction and legal costs.

Corporations have come to rely on enhanced scrutiny standards applying to specific situations exemplified in *Unocal* and *Revlon*, not for independent merger agreements. *See Omnicare*, 818 A.2d at 943. Requiring corporations to negotiate fiduciary out clauses in locked-up transactions defeats the very purpose of merger agreements: to facilitate "exchange certainties" between a bidder and a target corporation. *Id.* at 942. Furthermore, certainties are extremely valuable to corporations that are heavily invested into acquiring a

target company. *Id.* Allowing a third party to come in and trump a prior bid anytime would decrease merger opportunities. See *id.*

2. There has been no justifiable reliance on *Omnicare*, and in reality, principles of law have evolved to render the *Omnicare* decision limited in its use.

The pattern of subsequent decisions after *Omnicare* reveals that courts have been not been justifiably relying on the *Omnicare* rule. In fact, Delaware Chancery Courts are now willing to side step *Omnicare*'s narrow application. Only a year after *Omnicare* was decided, Vice Chancellor William Chandler examined a lock-up provision between two tobacco companies and was presented with an opportunity to directly apply the *Omnicare* rule. *Orman v. Cullman*, No. Civ.A.18039, 2004 WL 2348395, at *1 (Del. Ch. Oct. 20, 2004). In *Orman*, a shareholder brought an action against a target corporation's board of directors and its majority shareholders (also on the board) for violating their fiduciary duties in negotiating a stockholders' voting agreement and other deal protection mechanisms with an acquiring corporation. *Id.* at *5. Because a termination fee provision did not come up during the negotiation process, the voting agreement prohibited the defendants from selling their shares, and to vote against any third party acquisition proposal for 18 months following a termination of the merger. *Id.* at *4. The CFO of the acquiring corporation justified the voting agreement by stating that the central purpose was to protect the corporation from a third party bidders. *Id.* at *2. The plaintiff argued that the majority shareholders of the target corporation violated the *Omnicare*. *Id.* at *5.

Vice Chancellor Chandler ruled that the plaintiff misapplied the *Omnicare* rule because the majority shareholders entered into the voting agreement as shareholders, and nothing in the agreement prevent the majority shareholders from exercising their duties as officers and directors. *Id.* He further opined that a majority shareholder has the discretion to sell his stock whenever and to whomever he wants – a discretion that originates from "the majority shareholder's rights qua shareholder." *Id.* The plaintiff's argument that the hypothetical deal was locked-up for 18 months was quickly dispelled because the board retained a fiduciary out since it could consider superior proposals and recommend against the deal to the shareholders who could conceivably reject the merger. *Id.* at *8. In essence, the 18-month lock up was not unreasonable given the absence given the acquiring corporation's "understandable concern" about sunken costs and market uncertainties. *Id.*

Without expressly stating it, Vice Chancellor Chandler provided a blueprint for sidestepping the *Omnicare* decision. Ultimately, as long as a third party bidder could theoretically deal with the target corporation, a lock-up provision was not per se invalid under *Omnicare*. *See id.* Here, on the surface, Sunstein and Sarabhai's arrangement to enter into Ravert Ward's voting provision bears a close resemblance to the provisions that the Court invalidated in *Omnicare*. However, Ravert Ward's attempt to lock up the merger agreement for approximately four months even if the BTRta board "no longer considered the Ravert Ward merger desirable" would be permissible

under Vice Chancellor Chandler's analysis in *Orman* because the BTRta shareholders could reject Ravert Ward's proposal.

Four years after the *Orman* decision, Vice Chancellor Stephen Lamb was also presented an opportunity to apply the *Omnicare* rule in a case involving a lock-up provision between two corporations. Transcript of Oral Argument at 127, *Optima International of Miami v. WCI Steel, Inc.*, (Del. Ch. June 27, 2008)(No. 3833-VCL). In *WCI Steel*, the defendant (the target corporation) and an acquiring corporation agreed to an acquisition provision where the stockholders of the target corporation would convene to vote on the acquisition the very same day the board approved it. *See id.* The plaintiff, Optima International, argued that the shareholder vote that occurred immediately after the board approved the acquisition was effectively a lock-up that violated the *Omnicare* rule because there was no fiduciary out clause in place. *Id.* However, Vice Chancellor Lamb quickly disarmed plaintiff's argument by noting three things: (1) that "Omnicare is of questionable continued vitality," (2) the uncertainty of being able to consummate any transaction and the natural progression of the transaction justified the quick vote, and (3) nothing in the Delaware General Corporation Law requires a particular time period between a board's authorization of a transaction and a stockholder vote. *Id.* Therefore, Vice Chancellor Lamb, like Vice Chancellor Chandler, consciously side-stepped the *Omnicare* decision when he examined the lock-up provision.

3. Society has changed as to have taken away the significance of *Omnicare*'s application.

In the wake of numerous corporate frauds during the past 20 years, as exemplified by Enron, Tyco, and WorldCom, Congress enacted the Sarbanes-Oxley Act of 2002 ("SOA") to protect the public from corporate fraud and greed. Within a year of SOA's passage, the majority in *Omnicare* naturally responded to the movement of holding corporate America accountable by giving shareholders another reason to bring actions against board of directors. Jay H. Knight, *Merger Agreements Post-Omnicare: How the Delaware Supreme Court Pulled the Plug on "Mathematical Lock-Ups,"* 31 N. KY. L. REV. 29, 48 (2004). However, not only has Congress responded appropriately to societal outrage, but government agencies like the Securities Exchange Commission ("SEC") have also been taking measures to protect shareholders and mitigate Wall Street deception. Now that there are legislative protectants in place, the *Omnicare* decision must now be appropriately scaled back.

4. *Omnicare* has lost its legal vitality.

Vice Chancellor Lamb in *WCI Steel* stated that that "*Omnicare* is of questionable continued vitality." Transcript of Oral Argument at 127, *Optima International of Miami v. WCI Steel, Inc.*, (Del. Ch. June 27, 2008)(No. 3833-VCL). And other jurisdictions have agreed with this statement. Recently, a district judge for the California Court of Appeals quickly dismissed a plaintiff's assertion that a board of directors breached its fiduciary duty when it failed to include a fiduciary out clause in a merger agreement with an acquiring corporation. *Monty v. Leis*, 123 Cal.Rptr.3d 641, 646 (Cal. Dist. Ct.

app. 2011). The judge quoted a footnote from a Delaware case authored by Vice Chancellor Leo Strine that declared "Omnicare 'represents....an aberrational departure from [the] long accepted principle' that what matters is whether the board acted reasonably in light of all the circumstances." *See id.* (citing to a Delaware's Court of Chancery opinion *In Re Toys R Us Shareholder Litigation*). Courts across various jurisdictions are recognizing Delaware's inconsistent decisions, and this Court cannot ignore its duty to change and participate in the growth of law to ensure that decisions are uniform and predictable. *Travelers*, 594 A.2d at 46.

CONCLUSION

For the reasons stated above, this Court should reverse the Court of Chancery's decision to grant the petitioner's motion for a preliminary injunction, and should also overrule *Omnicare*.

Respectfully Submitted,

/s/

Law Firm C
Attorneys for Appellants