

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF CITATIONS.....ii

NATURE OF THE PROCEEDINGS.....1

SUMMARY OF THE ARGUMENTS.....2

STATEMENT OF FACTS.....2

ARGUMENT.....10

I. THE COURT OF CHANCERY ERRONEOUSLY ERRED IN ITS DECISION TO GRANT THE MOTION FOR PRELIMINARY INJUNCTION AND ENJOIN THE RAVERT WARD - BTRTA MERGER AGREEMENT BECAUSE ARTICLE II IS VALID WHEN APPLIED TO THE REVLON FIDUCIARY DUTIES REQUIRED OF THE BOARD.....10

 A. QUESTION PRESENTED.....10

 B. SCOPE OF REVIEW.....10

 C. MERITS OF THE ARGUMENT.....11

 i. REVLON IS BEST INTERPRETED AS REQUIRING, AS A FIDUCIARY DUTY, THE BEST DEAL FOR SHAREHOLDERS IN A MERGER AGREEMENT.....11

 ii. ARTICLE II REQUIRES THE BOARD TO CONSIDER BOTH SHORT AND LONG TERM PROSPECTS FOR THE BEST INTERESTS OF BOTH THE COMPANY EMPLOYEES (PAST AND PRESENT) AND THE SHAREHOLDERS, WHICH IS NOT INCONSISTENT WITH REVLON.....12

II. THE COURT OF CHANCERY ERRONEOUSLY ERRED IN ITS DECISION TO GRANT THE MOTION FOR PRELIMINARY INJUNCTION AND ENJOIN THE RAVERT WARD - BTRTA MERGER AGREEMENT BECAUSE THE DEAL PROTECTION DEVIES SATISFY THE UNOCAL TEST UNDER OMNICARE.....17

 A. QUESTIONS PRESENTED.....17

 B. SCOPE OF REVIEW.....17

 C. MERITS OF THE ARGUMENT.....17

 i. THE RAVERT WARD - BTRTA MERGER AGREEMENT SATISFIES OMNICARE.....19

 ii. ALTERNATIVELY, THIS COURT SHOULD OVERTURN OMNICARE.....21

CONCLUSION.....24

TABLE OF CITATIONS

DELAWARE SUPREME COURT CASES

Aronson v. Lewis,
473 A.2d 805 (Del. 1984).....11

Citron v. Fairchild Camera and Instrument Corp.,
970 A.2d 235 (Del. 2009).....14

Gilbert v. El Paso Co.,
575 A.2d 1131 (Del. 1990).....18

Guth v. Loft, Inc.,
A.2d 503 (Del. 1939).....11

Lawson v. Meconi,
897 A.2d 740 (Del. 2006).....10, 17

Lyondell Chemical Company v. Ryan,
970 A.2d 235 (Del. 2009).....13

Mills Acquisition Co. v. Macmillan, Inc.,
559 A.2d 1261 (Del. 1989).....12, 15

Omnicare, Inc. v. NCS Healthcare, Inc.,
818 A.2d 914 (Del. 2003).....17, 18, 21, 22, 23

Paramount Commc'ns, Inc. v. QVC Network, Inc.,
637 A.2d 34 (Del. 1993).....12

Paramount Communications v. Time Inc.,
571 A.2d 1140 (Del. 1989).....18

Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.,
506 A.2d 173 (Del. 1986).....11, 12, 13

Unitrin, Inc. v. Am. Gen. Corp.,
651 A.2d 1361 (Del. 1995).....18

Unocal Corp. v. Mesa Petroleum Co.,
493 A.2d 946 (Del. 1985).....17, 18

DELAWARE COURT OF CHANCERY CASES

Air Prods. & Chems., Inc. v. Airgas, Inc.,

16 A.3d 48 (Del. Ch. 2011).....17

In re Dollar Thrifty,

14 A.3d 573 (Del. Ch. 2010).....13

NATURE OF THE PROCEEDINGS

On December 16, 2011, Appellee, Consolidated Forest Industries Co., ("CFI"), commenced an action seeking a preliminary injunction against the consummation of a merger agreement between Appellant, BTRta Forest Products, Inc. ("BTRta") and Appellants Ravert Ward L.P ("Ravert Ward") and BTR Acquisition Corp. ("BTR").

This action follows a January 26, 2012, Court of Chancery decision (Jeuell, S.) granting CFI's motion, thus, enjoining BTRta from taking any action to consummate any term or provision of the Merger Agreement between BTRta and Ravert Ward.

In the Court of Chancery opinion, the Court found that a charter provision that would enable a board of directors to act with less regard for the interests of stockholders than would otherwise be the case absent the provision should be proscribed. Specifically, the Court held that to the extent that Article II of BTRta's certificate of incorporation allowed BTRta directors to forgo a merger that offered stockholders greater current value, based exclusively on the interests of stakeholders other than stockholders was contrary to Delaware law. Additionally, the Court held that the BTRta directors were not at liberty to rely on Article II in approving the Ravert Ward Merger, and their reliance on interests other than the interests of BTRta's stockholders was a breach of their fiduciary duty to those stockholders. It is in response to this judgment that BTRta now appeals, seeking reversal of the preliminary injunction.

SUMMARY OF THE ARGUMENTS

This analysis will examine two issues. The analysis will first explain why Article II is valid when applied to the Revlon fiduciary duties that the BTRta Board of Directors are required to follow. Specifically, the analysis will discuss why Article II is consistent with Revlon because it requires the Board of Directors to consider the short and long term best interests of the BTRta employees and Shareholders.

Second, this analysis will discuss why the *Omnicare* decision should be overruled. Regarding this issue, the analysis will examine the difference between deal protection devices and defensive measures, and fully explain why the two are not analogous. Additionally, even if *Omnicare* is not overruled, and therefore applies to the facts of this case, the preliminary injunction should still be denied because the provisions in the BTRta - Ravert Ward Merger Agreement satisfy both prongs of the *Unocal* test.

STATEMENT OF FACTS

A. The parties

Appellant, BTRta Forest Products, Inc., is a Delaware corporation with its principle place of business in Portland, Maine. Record at 4. BTRta's product operations range from the eastern United States and Canada to Central and South America, Southeast Asia, and central Africa. Id. Appellants Matthew Sunstein ("Sunstein") and Vikram Sarabhai ("Sarabhai") are the founders and members of the board of directors of BTRTA. Id. Sunstein and Sarabhai have also served as co-chief executive officers of BTRTA since its founding. Id.

Appellant, Ravert Ward, L.P., is a Delaware limited partnership based in Haverhill, Massachusetts. Id. at 3-4. Ravert Ward is an acquisition firm that specializes in arranging private acquisitions of smaller public companies. Id. at 4.

Appellee, Consolidated Forest Industries Co., is a Delaware corporation headquartered in Boise, Idaho. CFI has operations throughout the United States, Canada, Brazil, Indonesia, and Central America. Id. at 3. CFI is one of the world's largest producers of paper and wood products, and owns 4,300 shares of BTRta's Common Stock. Id.

B. BTRta's History and Corporate Governance

Sunstein and Sarabhai met in 1983 at the Massachusetts Institute of Technology. Id. They both shared a passion for engineering and environmentalism, and decided to start a company that would manufacture and sell forest products while minimizing adverse environmental impacts. Id.

In 1987, Sunstein and Sarahai formed BTRTA. Id. at 5. In 2000, BTRta engaged in an initial public offering of Class A Common Stock. Id. Those shares have traded on the Nasdaq Stock Market ranging from \$13 to \$14 per share. Id. BTRta's certificate of incorporation provides for two classes of common stock, Class A and Class B, of which 25,267,042 shares of Class A common stock and 2,567,304 shares of Class B common stock were outstanding as of December 31, 2011. Id. The only difference between the Class A and Class B Common Stock is that the Class B Common stock is entitled to ten votes per share in all matters in which the common stocks votes, while the Class A Common

Stock is only entitled to one vote per share. Id. The shares of Class A and Class B Common Stock vote together as a single class. Id.

All of the Class B Common Stock is owned by Sunstein and Sarabhai and members of their families, and it currently constitutes 50.4% of the voting power of BTRta's outstanding stock and about 9.2% of the number of outstanding shares. Id. at 5-6. The next largest stockholders of BTRta are six investors each owning between 0.5% and 1.1% of BTRta's Class A Common Stock. Id. at 6. BTRta's senior officers other than Sunstein and Sarabhai own a combined total 581,142 shares of Class A Common Stock. Id. BTRta's certificate of incorporation expressly prohibits the taking of stockholder action by written consent in lieu of a meeting of stockholders. Id.

Additionally, Article II, of BTRta's certificate of incorporation provides:

In 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 other 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 its subsidiaries operate, (collectively, with the stockholders, the "Stakeholders"), together with the short-term, as well as long-term, interests 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. Nothing in this Article is intended to or shall create or grant any right in or for any person or any cause of action by or for any person. Notwithstanding the foregoing, 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.

Id.

A Change in Control includes a merger in which the Company's stock is converted into the right to receive cash. Id. Article II was adopted in 1997 before BTRta's initial public offering in anticipation of seeking an investment from a venture capital firm.

Record at 6-7. Under the "Risk Factors" section of the prospectus for the initial public offering, Article II was described as follows:

[Article II] . . . requires the Company's directors, in exercising their managerial authority, to consider the best interests of the Company by reference to the social, economic, legal, or other 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 its subsidiaries operate, together with the short-term, as well as long-term, interests 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. This provision reflects the views of the Founders [Sunstein and Sarabhai] that the Company's operations should be conducted ethically and with a view to long-term sustainability of both the Company's operations and the environments in which the Company operates, even if stockholder value is not maximized. In addition, Article II permits the directors to rely on the foregoing definition of the Company's best interests in discharging their duties, even in the context of a sale of the company of other change of control transaction where, as a result of weighing other stakeholders' interests, the directors accept an offer with a lower price per share than a competing offer. In that context, the directors' acceptance of the lower per share offer would not, under Article II, be considered a breach of the directors' fiduciary duty. As a result, Article II may permit the Company's directors to engage in conduct and make decisions that would result in lower stockholder value than what would be permissible in the absence of the provision. The validity of Article II is uncertain, however, although the Company intends to defend the validity of the provision if it were challenged.

Id. at 7.

The CFI Merger Agreement

At a board meeting with BTRta's board of directors on April 20, 2011, Sunstein and Sarabhai communicated that they were frustrated with their roles in managing BTRta as a publicly held company. Id. They also mentioned they were frustrated because their attempts to attend to what they considered to be the important aspects of the business were being interrupted. Id. Additionally, they revealed that they would address their concerns by either selling their BTRta Stock, or by acquiring all the publicly held shares of BTRta. Id. at 7-8. At this meeting, the BTRta board of directors decided to hire Eberhard Jefferson L.P. ("Eberhard") as BTRta's financial advisor to explore potential transactions, including mergers or acquisitions, to address BTRta's situation. Record at 8.

After meeting with Eberhard, Sunstein and Sarabhai felt the most suitable option for them would be sell BTRta. Id. Sunstein and Sarabhai presented this option to the board of directors at a meeting on May 18, 2011. Id. In response to the concerns of several of the independent directors that any sale of BTRta should involve a sale of its publicly held shares as well as the Class B shares owned by Sunstein and Sarabhai, it was unanimously decided by the board of directors that Eberhard should begin the process of identifying and obtaining bids to acquire the entire equity of BTRta, both the Class A and the Class B shares. Id.

Due to economic factors, the process of identifying potential bidders proceeded slowly. Id. However, by late summer, Eberhard had received interest from CFI in acquiring BTRta. Id. In September

2011, CFI offered to acquire BTRta by merger at a price of \$16.50 per BTRTA share, which was approximately 25% over the prevailing market price of Class A BTRta shares. Id. at 8-9. When Sunstein and Saraghai were informed of the CFI offer they were concerned because they questioned if CFI would commit to maintain the environmentally responsible practices that BTRTA promoted. Id. at 9. As a result, Sunstein and Sarabhai met with CFI representatives on October 7, 2011, to discuss the acquisition. Id. At this meeting, Sunstein and Sarabhai were assured that post-merger they would serve as consultants to the Environmental Committee of CFI's board of directors, and would be consulted on any significant alteration of CFI's environmental practices regarding operations being acquired from BTRta. Id. Additionally, CFI increased its offer to \$17 per share. Id.

On October 17, 2011, the BTRta board of directors met to consider the CFI merger. Id. At the conclusion of the meeting, the BTRta board approved the merger agreement, and later that day the agreement was executed on behalf of CFI, BTRta, and CFI's acquisition subsidiary. Id.

Under the agreement, BTRta was required to present the proposed offer to its stockholders for a vote. Id. at 10. However, BTRta was permitted to seek out other offers, and terminate the merger agreement if a Superior Proposal was made during the 60-day period following board approval of the merger.¹ Id. However, if BTRta terminated the

¹ A Superior Proposal included any merger 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.

merger agreement, CFI would be entitled to a termination fee of \$15 million, or roughly 3.2% of the total value of the transaction. Id.

The Ravert Ward Merger Agreement

Despite their anticipated role as consultants for CFI, Sunstein and Sarabhai continued to be concerned about their ability to promote BTRta's societal interests. Id. With these concerns in mind, Sunstein and Sarabhai contacted Ravert Ward. Id. In October, Eberhard, Sunstein, and Sarabhai met with Ravert Ward's principals to discuss the possibility of an acquisition of BTRTA by Ravert Ward. Ravert Ward communicated that it could not finance a transaction at a greater price than what CFI agreed to pay. Id. at 11. Ravert Ward communicated that \$13 per share was the most it could offer. Id. On that note, this meeting ended without any commitment to pursue the transaction. Id.

As the 60-day termination period grew near, Eberhard contacted Ravert Ward to see if there was any flexibility on price and other terms. Id. Ravert Ward was receptive, and in a series of meetings in early December, BTRta and Ravert Ward's representatives began intensive negotiations. Id. Ultimately, Ravert Ward agreed to offer \$15.50 per share in cash for BTRta's stock, which was a premium over the pre-merger agreement price of BTRta stock. Id. Additionally, Ravert Ward assured BTRta that BTRta's environmentally responsible practices would continue, and that Sunstein and Sarabhai would have consulting roles in pursuing that commitment. Id.

However, in order to make these concessions, Ravart Ward insisted on several conditions. Specifically, Ravart ward demanded the following:

- Sunstein and Sarabhai would be required to execute written agreements to vote all of their shares of Class B Common Stock in favor of the merger;
- Pursuant to Section 146 of the Delaware General Corporation Law, the board of directors of BTRta would be required to present the merger agreement to a vote of its stockholders as soon as practicable, and in any event on or before April 1, 2012, even if the board no longer considered the Ravert Ward merger desirable;
- BTRta would not be permitted to solicit any competing merger proposal prior to the stockholder vote on the merger.
- In the event of a termination of the merger agreement following consummation of a business combination with a person other than Ravert Ward or one of its affiliates, BTRta would be required to pay to Ravert Ward a termination fee of \$15 million.

Id. at 12.

The BTRta board of directors met on December 13, 2011, to consider the Ravert Ward merger agreement. Id. The board concluded that it was significantly more likely that BTRta's environmental practices would continue and possibly improve following an acquisition by Ravert Ward than in the case of an acquisition by CFI. Id. Weighing that consideration, the interests of the communities and society served by BTRta, and recognizing that the Ravert Ward merger agreement still offered BTRta stockholders a premium to pre-merger

market prices, the board declared the Ravert Ward merger agreement a Superior Proposal, and to approve the Ravert Ward merger agreement. Id. Sunstein and Sarabhai also agreed to enter into the voting agreements requested by Ravert Ward, and did so after the board meeting. Id.

BTRta informed CFI of the Ravert Ward merger agreement later on December 13, 2011, and submitted that merger agreement to CFI. Id. at 13. On December 14, 2011, counsel for CFI informed counsel for BTRta that CFI objected to the Ravert Ward agreement, considered it a violation of BTRTA directors' fiduciary duties, and would bring suit to enjoin consummation of the merger. Id.

ARGUMENT

III. THE COURT OF CHANCERY ERRONEOUSLY ERRED IN ITS DECISION TO GRANT THE MOTION FOR PRELIMINARY INJUNCTION AND ENJOIN THE RAVERT WARD - BTRTA MERGER AGREEMENT BECAUSE ARTICLE II IS VALID WHEN APPLIED TO THE REVLON FIDUCIARY DUTIES REQUIRED OF THE BOARD.

A. QUESTION PRESENTED

Whether Article II of BTRta's Certificate of Incorporation is invalid as per the fiduciary duties articulated in *Revlon*.

B. SCOPE OF REVIEW

"[The Delaware Supreme Court]...reviews the denial of a motion for a preliminary injunction under the abuse of discretion standard." Lawson v. Meconi, 897 A.2d 740, 743 (Del. 2006). "However, the Court of Chancery's legal conclusions are subject to *de novo* review." Id. Therefore, the Court of Chancery's order granting the preliminary injunction, which effectively halted the consummation of the Ravert Ward - BTRta Merger Agreement is subject to *de novo* review. See id.

C. MERITS OF THE ARGUMENT

Whether this Court should validate Article 11 and overturn the order granting a preliminary injunction rests upon the interpretation of Revlon's fiduciary duty of "maximizing shareholder value". Existing case law gives rise to a broad interpretation, where value may include considerations other than money.

i. REVLON IS BEST INTERPRETED AS REQUIRING, AS A FIDUCIARY DUTY, THE BEST DEAL FOR SHAREHOLDERS IN A MERGER AGREEMENT

In *Revlon v. MacAndrews & Forbes Holdings, Inc.*, the Delaware Supreme Court iterated the rule regarding corporation changes in control and the fiduciary duties required of officers and directors. *Revlon*, 506 A.2d 173, 180 (Del. 1986). While the ultimate managing responsibility falls on the board of directors, the directors still owe fiduciary duties to the corporation in merger dealings. 8 DEL. C. § 141(a); *Guth v. Loft, Inc.*, A.2d 503, 510 (Del. 1939). Ordinarily, the business judgment rule would be the prevailing method of reviewing the board's actions. Under the business judgment rule, the court gives deference to director conduct, presuming that "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 interests of the company." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). Most notably, "a court will not substitute its judgment for that of the board if the latter's decision" is attributable to a rational business purpose. *Id.*

However, the Court found that when a takeover commences, there is a potential danger for corporate officers to act in their own interests and therefore, those individuals have the burden of demonstrating good faith and reasonable decision-making in the process taken by the board. Revlon, 506 A.2d at 180. In *Revlon*, the directors entered into an agreement with Forstmann Little & Co., whereby Revlon would deal exclusively with Forstmann in the event of a takeover or pay a \$25 million cancellation fee if the deal was not consummated. Id. at 176. The Court found that the directors owed a fiduciary duty to maximize the company's value for the benefit of the shareholders by reasonable efforts and had violated that duty by entering into the agreement with Forstmann. Id.

The Court effectively altered the judicial review of such actions when a "change in control" is apparent, increasing the laxer standard of the business judgment rule ("rationality"). Revlon, 506 A.2d at 176. The new standard of review, "reasonableness", requires the directors, by a fiduciary duty, to focus on one objective: to secure the most valuable transaction reasonably available to maximize shareholder benefits. Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34, 44 (Del. 1993).

- ii. ARTICLE II REQUIRES THE BOARD TO CONSIDER BOTH SHORT AND LONG TERM PROSPECTS FOR THE BEST INTERESTS OF BOTH THE COMPANY EMPLOYEES (PAST AND PRESENT) AND THE SHAREHOLDERS, WHICH IS CONSISTENT WITH *REVLON*.

Revlon established the method by which director actions during a merger agreement would be reviewed by the courts. Revlon, 506 A.2d at 180. A director owes an important fiduciary duty to shareholders of the company at the time of a merger: maximize shareholder profits by

getting the best value in the sale of the company. Id. In *Macmillan*, the Court elaborated on the exercise of that fiduciary duty, stating that a totality of the interests involved may be taken into account. Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1285 n. 35 (Del. 1989). Specifically, a board may consider the impact of the potential acquisition on the interests of the shareholders and the company, when it bears a relationship to the general shareholder interests and the bidder's business plans for the corporation and those effects on the interests of the shareholders. Id. at 1282, n. 29. The identity of the bidder and its prior business experiences are also relevant to the decision of the board. Id.

Revlon does not determine the process by which the board takes steps to attain the best value, but only dictates that the best deal for the shareholders be made. In Re Dollar Thrifty Shareholder Litigation, 14 A.3d 573, 595 (Del. 2010). The only question for the Court to decide is whether the steps taken were reasonable, not whether the Court would have suggested a different method. Id. Directors face a unique set of circumstances and must be permitted to chart the interests of their own shareholders without regard to what the court or outsiders would have decided given the same. Lyondell Chemical Company v. Ryan, 970 A.2d 235, 242 (Del. 2009). The directors at BTRTA must only show that their actions were reasonable in an effort to make the best deal for the shareholders. Id. The Court has distinguished inadequate efforts to carry out a fiduciary duty and a conscious disregard for it. Id. at 243. By taking steps to ensure that the long-term interests as well as short-term value

were the best deal for the shareholders, the BTRta directors have satisfied their fiduciary duty.

In regards to Revlon duties, the main concern is that the board might harbor personal motives to making a decision. Id. at 597. Those concerns are relieved here, where the directors do not have an added incentive to choose an offer. In fact, the Court of Chancery specifically states that there is no issue of self-dealing in this case, when Sunstein and Sarabhai would be retained as consultants in either merger. Our only concern is whether the directors made the best deal for the company and the shareholders. We argue that acting in the interests of the BTRta shareholders involves both a short-term and long-term analysis of both economical and ecological gains.

The Court found the fiduciary duty had not been violated in *Citron*, where the directors decided against a merger with a company with a reputation for being ruthless with its newly acquired companies. Citron v. Fairchild Camera and Instrument Corporation, 569 A.2d 53, 57 (Del. 1988). Fairchild was approached by Gould, a manufacturer of electronics, for acquisition. Id. Although the proposal was financially enticing for the shareholders, the directors were concerned about the future of Fairchild once the merger was complete. Id. Gould's reported policy of breaking up the organization in order to fit the pieces into Gould's divisions, like a jigsaw puzzle, jeopardized the status of officers, despite positive assurances from Gould. Id. Similarly, the BTRta directors were faced with two mergers: one that presented an uncertain future for BTRta and one that matched the values of BTRta and its directors and

shareholders alike. Sunstein and Sarabhai were concerned about the long-term value of the company if its sustainable practices and methods were abandoned, as was likely in the case of a CFI merger. Rather, a Raver Ward promoted the same business vision that BTRta currently held for itself and thus appeared more valuable. Sunstein and Sarabhai made a decision to benefit the long term goals as well as short term price for the shareholders and the company.

Conversely, the Court found a violation of fiduciary duty when the managers acted in their own financial interests and the board of directors failed to exercise good faith and fairness. Macmillan, 559 A.2d at 1267. The management failed to evaluate the merger agreement with KKR from an "independent" viewpoint and deliberately concealed material information from the board of directors in order to propel their preferred bidder, KKR, to the forefront of the auction. Id. at 1279. In addition, the board was at fault for lack of structure and directing of management, enabling the misconduct to occur. Id. Directors are required to act in good faith and conduct fair dealing in an effort to acquire a fair price. Id. at 1280. Directors owe a fiduciary duty to acquiring the highest reasonable value for the shareholders, which did not occur in *Macmillan*. Id. In regards to Sunstein and Sarabhai, they sought the best deal for their shareholders, by maximizing the value of the company in both financial and environmental concerns. Article II requires a higher duty of the BTRta directors; for them, fair price includes the ability of the company to retain its sustainable practices and to continue in the nature it was created. Juxtaposed with *Macmillan*, the BTRta directors

sought the best deal for their shareholders. Consideration for their own future with the company was immaterial because they would be retained as consultants with either merger.

Thus, the actions taken by the BTRta directors were reasonable given the information they received about CFI and Ravert Ward. BTRta is in the forest products business and seeks to maintain environmentally friendly practices. CFI is one of the world's largest producers of paper and wood products, but its size and history of logging practices made it questionable for BTRta to maintain its environmentally responsible practices after the merger. In comparison, Ravert Ward is a smaller acquisition firm with a reputation for organizing socially responsible corporations. BTRta's certificate of incorporation demonstrates the importance of maintaining sustainable business practices and it is likely that the shareholders feel just as passionate about this issue and hold stock in BTRTA for just that reason. BTRta's long-term financial situation is interconnected to its ability to retain sustainable practices. Global awareness of environmental issues is on the rise and BTRta could profit from allying itself with another company engaged in sustainable practices. CFI is a large corporation and is likely to have no need for BTRta to remain a single unit once acquired and therefore, under the circumstances of the two offers, the Ravert Ward merger agreement was the best possible choice.

Overall, *Revlon* articulated a fiduciary duty for corporate officers during a merger: to gain the best value for shareholders. Article II satisfies that requirement and merely redefines "value"

according to the BTRta shareholders, taking into consideration both short-term monetary and long-term business planning goals.

IV. THE COURT OF CHANCERY ERRONEOUSLY ERRED IN ITS DECISION TO GRANT THE MOTION FOR PRELIMINARY INJUNCTION AND ENJOIN THE RAVERT WARD - BTRTA MERGER AGREEMENT BECAUSE THE DEAL PROTECTION DEVIES SATISFY THE UNOCAL TEST UNDER OMNICARE

A. QUESTIONS PRESENTED

Whether the Ravert Ward - BTRta Merger Agreement satisfies the Unocal test under *Omnicare* and alternatively, whether the *Omnicare* decision should be overturned.

B. SCOPE OF REVIEW

As previously addressed, the review of a grant for preliminary injunction is abuse of discretion. Lawson, 897 A.2d at 743. However, the Court of Chancery's legal conclusions are subject to *de novo* review. Id. Therefore, this Court will review the Court of Chancery's order granting the preliminary injunction *de novo*. See id.

C. MERITS OF THE ARGUMENT

Omnicare v. NCS Healthcare, Inc. was a landmark decision in Delaware corporate law, enforcing a heightened standard for the actions of boards of directors. However, this rare three-two split decision of the Delaware Supreme Court left many unanswered questions of how to "lock-up" a merger and fulfill fiduciary duties to shareholders while surviving enhanced judicial scrutiny. The sharp dissent in *Omnicare* raised enduring issues with the court's decision and exposed its inconsistencies with Delaware corporate law jurisprudence.

The court's ultimate decision relied on its application of the two part test from *Unocal*. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985). The Unocal test is tailored for situations where the board acts defensively to prevent a hostile takeover. *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 94 (Del. Ch. 2011). First, a board must show that there were reasonable grounds for belief that a danger to corporate policy and effectiveness existed. *Id.* at 955. Second, the board must show that the action taken was "reasonable in relation to the threat posed." *Id.* The board does not have "unbridled discretion to defeat a perceived threat by any draconian means available." *Id.* at 955-956. In applying the second prong, "a court must first determine that the measures are not preclusive or coercive before its focus shifts to the 'range of reasonableness' in making a proportionality determination." *Omnicare*, 818 A.2d at 932.

"The law is clear that *Unocal* is invoked as the result of any defensive measures taken in response [to threats] which touch upon issues of control." *Gilbert v. El Paso Co.*, 575 A.2d 1131, 1141 (Del. 1990) (See *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361 (Del. 1995) finding that the board's poison pill was subjected to the Unocal standard). Enhanced scrutiny is necessary because decisions in hostile situations are *reactive in nature*. *Unocal*, 493 A.2d at 954. See *Paramount Communications v. Time Inc.*, 571 A.2d 1140, 1148 (Del. 1989) (Time and Warner restructured their original transaction *in response* to the Paramount bid; therefore, Unocal analysis was appropriate.) "Because of the omnipresent specter that a board may be

acting primarily in its own interests, rather than those of the corporation and its shareholders, there is an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred.” Id.

i. THE RAVERT WARD - BTRTA MERGER AGREEMENT SATISFIES *OMNICARE*

The terms in the Ravert Ward agreement are structurally similar to those in *Omnicare*; however, there are material differences that should change the court’s outcome. The provisions satisfy both prongs of the Unocal test and thus, the agreement is enforceable.

When applying the first prong, the BTRta board had reasonable grounds to believe that a threat to corporate policy existed. BTRta is a company founded on the principles of engineering and environmentalism. Founders Sunstein and Sarabhai applied their passion into running a business that had corporate responsibility. Despite the company changing control, their primary concern was that these principles were carried on to the acquiring company. Consequently, Sunstein and Sarabhai were to sell to CFI. The size of CFI’s operations and its history of logging practices led Sunstein and Sarabhai to question whether CFI would credibly commit to maintain the environmentally responsible practices that BTRTA had so carefully promoted.

Because larger societal interests remained the focus for a potential buyer, Eberhart put the founders in touch with the buy-out firm of Ravert Ward. Ravert Ward had been involved in several private acquisitions of companies focused on corporate social responsibility. They were concerned with improving their reputation as a leading

organizer of socially responsible corporate acquisitions. With a history of dealing with similar companies, the BTRTA board recognized that Ravert Ward would protect the company's long-term ideals.

In addition, the Merger Agreement also satisfies *Unocal's* second prong because the terms are not preclusive or coercive. The deal protection devices were a proportional response to the threat to BTRta's corporate policy. The voting agreements by Sarabhai and Sunstein do not automatically coerce the shareholders into an unwanted deal. Sunstein, Sarabhai, and members of their families own 50.4% of BTRta's voting majority. The voting agreements only secure the shares owned by Sunstein and Sarabhai. If family members own at least .5% of the Class B shares, the voting agreements do not create a "fait accompli". The shareholder vote could effectively disapprove the transaction.

Because the voting agreements do not automatically constitute a majority, the agreement does not require a fiduciary out provision. The shares that are contractually committed to vote for the Ravert Ward proposal do not limit the entire board's ability to protect the other shareholders. Unlike *Omnicare*, Sunstein and Sarabhai make up two of seven directors on the board. In the absence of a fiduciary clause, the Board as a whole was still committed to fulfilling their duties to the corporation and shareholders.

The Ravert Ward terms satisfy the *Unocal* test from *Omnicare*. The Board had a reasonable belief in a threat to BTRta's commitment to environmentalism. In securing a proposal from a more eco-responsible company, the Agreement sought to protect an acquisition by Ravert

Ward. This response is reasonably proportionate to the long-term concerns after considering the histories of both CFI and Ravert Ward. Therefore, this Court should reverse the preliminary injunction and enforce the Ravert Ward Agreement.

ii. ALTERNATIVELY, THIS COURT SHOULD OVERTURN *OMNICARE*

Omnicare's first flaw was the Court's fundamental application of the Unocal test to the Genesis - NCS exclusivity agreement between Omnicare, 818 A.2d at 930. The circumstances did not involve a hostile takeover and the agreement was not a defensive reaction by the board. Yet, the court applied the Unocal test to a friendly transaction. *Id.* To do so, the court equated defensive measures with deal protection devices:

A board's decision to protect its decision to enter a merger agreement with defensive devices against uninvited competing transactions that may emerge is analogous to a board's decision to protect against dangers to corporate policy and effectiveness when it adopts defensive measures in a hostile takeover contest.

Omnicare, 818 A.2d at 932.

But the two are not "analogous." This logical leap is in error for two reasons. First, in a hostile takeover, boards are forced to make swift decisions as a defensive reaction to external threats. In contrast, deal protection devices seek to effectively close a merger or acquisition. Each serves a distinct purpose. In *Omnicare*, the NCS board initiated negotiations for a sale of the company. *Id.* at 921. NCS executed the agreement after Genesis' proposal. *Id.* at 922-23. Thus, Unocal's application to a non-defensive agreement which NCS voluntarily entered into was erroneous.

Second, the Unocal test analyzes the board's response to a hostile takeover in isolation. The first stage addresses the threat to the company and the second addresses how the board reacts to that threat. This same analysis for deal protection devices is gravely problematic.

The provisions at issue in Omnicare were contemplated after a series of events spanning a long period of time. For example, NCS' financial status was deteriorating and it sought various investor groups regarding a restructuring in a "pre-packaged" bankruptcy. Omnicare, 818 A.2d at 921. "NCS did not receive a proposal that it believed provided adequate consideration for its stakeholders." Id. Several months later, negotiations began with Omnicare to structure the deal as an asset sale in bankruptcy. Id. Then, Genesis became a potential bidder. Id. As NCS' performance improved, the directors believed they could provide some recovery for NCS stockholders' equity. Id. at 922. Subsequently, Genesis made a proposal and requested that NCS secure the merger with certain provisions. Id. Unocal's two stages do not consider all the preliminary facts that lead to the deal protection devices. The board acted within a totality of circumstances and a snapshot analysis is not able to fully determine whether the board acted appropriately.

Once the court applied the Unocal test, the court discussed two issues in detail: the voting agreements and the absence of a fiduciary out provision. Id. at 934-939. The court determined that the provisions failed the second stage of the Unocal test. Id. at 936. The terms were deemed unenforceable because they were both preclusive

and coercive. Id. “The deal protection devices adopted by the NCS board were designed to coerce the consummation of the Genesis merger and preclude the consideration of any superior transaction.” Id. (emphasis added).

The court heavily relied on the corporate structure of NCS to come to this conclusion. Id. at 923. One of the provisions was a voting agreement for the shares held by President & CEO Kevin B. Shaw and Chairman of the Board Jon H. Outcalt. Id. Shares of NCS stock were divided into two classes, with Class A having one vote per share and Class B having ten votes per share. Id. at 918. Between Shaw & Outcalt, they held a 65% majority of the voting power through their ownership of the Class B stock. Id. The court stated that to execute such an agreement precluded the minority shareholders from voting against the merger, calling it a “fait accompli” – a done deal. Id. at 936. “Any stockholder vote would have been robbed of its effectiveness by the impermissible coercion that predetermined the outcome of the merger without regard to the merits of the Genesis transaction at the time the vote was scheduled to be taken.” Id. However, the shareholders were not denied an opportunity to approve or disapprove the transaction by virtue of the voting agreements. In fact, another provision in the agreement ensured that shareholders would have the opportunity to vote on the merger even if the Board no longer recommended it. Id. at 925. This “impermissible coercion” was present when investors chose to purchase shares of Class A stock. Their minority shareholder status was not contrived so that the Board could coerce the Genesis deal or preclude them from voting against it.

Therefore, the Court should not have considered NCS' corporate structure in Unocal's second stage analysis.

Although the court required a fiduciary out provision, the voting agreements alone do not discharge the board's fiduciary duties. In such cases, the court should defer to the board's decisions through the business judgment rule.

This court should overturn Omnicare because it was a friendly transaction that does not trigger the Unocal test. The enhanced scrutiny is not appropriate for deal protection devices. Additionally, the corporate structure does not rob shareholders of their ability to vote for or against a company transaction.

CONCLUSION

Article II of the BTRta's certificate of incorporation is valid when applied to the fiduciary duties mandated by Revlon. Furthermore, the deal protection devices in the Ravert Ward - BTRta Merger Agreement satisfy Omnicare. Alternatively, *Omnicare* should be overruled as inconsistent with Delaware law.

For the foregoing reasons, Appellant, BTRta, respectfully requests this Court to reverse the Court of Chancery's grant of preliminary injunction.

Respectfully Submitted,

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