

In the
SUPREME COURT OF THE STATE OF DELAWARE
February 10, 2012

BRT 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 BRT ACQUISITION)
CORP.,)
)
Appellants,)
)
v.)
)
CONSOLIDATED FOREST INDUSTRIES CO., a)
Delaware Corporation)
)
Respondent)
)
_____)

No. 142, 2012

On Appeal from
the Court of Chancery
for the State of Delaware

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

Team F
Counsel for Appellant

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NATURE OF PROCEEDINGS

On January 23, 2012, Appellee Consolidated Forest Industries Co. ("CFI"), filed a motion for preliminary injunction against Appellants BTRta Forest Products, Inc. ("BTRta "), its employees, agents, officers, directors, and Ravert Ward L.P. ("Ravert Ward") and BTR Acquisition Corp. (Opinion, 1). CFI sought to enjoin Appellants from consummating a merger agreement between BTRta and BTR Acquisition Corp., a wholly-owned subsidiary of Ravert Ward. On January 26, 2012, the Court of Chancery for the State of Delaware granted Appellee's request, and enjoined Appellants from satisfying the merger agreement. (Op. 1) In its written opinion, the Court of Chancery found that Appellants violated the rules set forth in the Delaware Supreme Court's holdings in *Revlon* and *Omnicare*. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 176 (Del. 1986); Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 918 (Del. 2003). The Court of Chancery rejected Appellants' assertions that *Revlon* was not violated, and that *Omnicare's* holding should be not be applicable as the instant case should be distinguished by the Court. (Op. 3)

The Court of Chancery issued the preliminary injunction order on January 31, 2012. (Preliminary Injunction Order, 1-2). On February 2, 2012, Appellants filed a notice of appeal from the Court of Chancery's finding. (Notice of Appeal, 1-2). On February 10, 2012, This Court granted Appellants' appeal to determine the issues presented above. (Order Accepting Interlocutory Appeal, 1-2).

SUMMARY OF ARGUMENT

The Court of Chancery erred in finding that Article II of BTRta's Certificate of Incorporation contrary to the fiduciary duties of the Board of Directors and the laws of the State of Delaware. Under 8 Del. C. §102(b)(1) (2011), the Certificate of Incorporation for a business can include "[a]ny provision for the management of the business and for the conduct of the affairs of the corporation . . . if such provisions are not contrary to the laws of this State."

Article II of BTRta's Certificate of Incorporation specifically outlines that the social and environmental effects of the company's actions partially determine the best interest of the Company and its stockholders even in the context of a Change in Control Transaction.

The lower court misapplied the holdings in *Revlon* and *Tri-Star* in determining that Appellants attempted to eliminate its fiduciary duty of loyalty, in that the actions in *Tri-Star* offended public policy, while the actions of Appellants served to outline and clarify the Directors' fiduciary duties to the stakeholders.

Furthermore, Appellants request that this Court review its prior holding in *Omnicare*, and distinguish the current case on the facts in the interests of public policy encouragement of responsible corporate behavior. The *Omnicare* decision should not apply for several reasons. The Board of Directors left a fiduciary out. There was no breach of the duties of good faith or loyalty.

STATEMENT OF FACTS

A. The Parties

BTRta is a Delaware Corporation with its principal place of business in Portland, Maine. (Op. 3). BTRta's primary business is the production and sale of forest products, such as specialty papers, chemicals, and lumber, using sustainable and eco-friendly practices. (Op. 4)

Appellants Matthew Sunstein and Vikram Sarabhai are the founders, current co-chief executive officers, and are current members of the Board of Directors for BTRta . (Op. 4,5)

Appellants Michael F. Allen, Miles D. Liu, Kathleen L. Todman, Janice L. Stern, Herbert P. McCusker, Paula R. Abazian, and William D. Hemphill are members of BTRta's Board of Directors, and collectively own 2,154,687 shares of BTRta's Class A common stock.

Ravert Ward is a boutique acquisition firm based in Haverhill, Massachusetts, focusing on the companies with businesses in corporate social responsibility. (Op. 4) Defendant BTR Acquisition Corp. is a wholly owned subsidiary of Ravert Ward, established for the purpose of merging with BTRta . (Op. 4)

CFI is a Delaware corporation with headquarters in Boise, Idaho. (Op. 3) CFI is a publicly traded company and one of the world's largest producers of paper and wood products. (Op. 3) CFI also owns 4,300 shares of BTRta Class A common stock. (Op. 2)

B. BTRta's Corporate Governance and Article II

BTRta was founded in 1987 by Appellants Sunstein and Sarabhi, for the purpose of utilizing innovative processes to manufacture and sell forestry products such as paper, lumber, and chemicals, through sustainable and eco-friendly practices. (Op. 5) From the company's inception through today, Sunstein and Sarabhi have been active in the corporation's management. (Op. 5)

As outlined in its Certificate of Incorporation, BTRta was created with two separate classes of common stock: Class A and Class B. (Op. 5) The only distinction between the two classes of stock is that Class B stock is entitled to 10 votes per share regarding shareholder voting matters. (Op. 5) There are currently 25,267,042 shares of Class A common stock having one vote per share (49.6%), and 2,567,304 shares of Class B common stock having 10 votes per share (50.4%). (Op. 5) Combined, appellants Sunstein and Sarabhi, and members of their families, own all shares of the Class B stock. (Op. 5) The market price for BTRta shares in 2011 varied between \$13 and \$14 per share. (Op. 5) At immediate issue in the current case is BTRta's Certificate of Incorporation, specifically Article II. Article II was adopted in 1997 before Sunstein and Sarabhai opened the company to outside investment. The article, in its entirety, 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. (Op. 6)

Article II explicitly defines the "best interest" of the company to be not only the company's financial performance, but its social and environmental impacts as well. Further, the Article outlines that consideration of environmental and social interests is not against a Director's fiduciary duty, even in the context of a Change in Control Transaction. In late 2000, when Sunstein and Sarabhai took the company public, BTRta gave additional notice of Article II and its social and environmental goals to potential stockholders in the prospectus section of its IPO. (Op. 7) This prospectus outlined the potential risks associated with the purchase of BTRta shares and created contractual obligations between shareholders and directors. (Op. 7) The full text of the Prospectus is included in the Appendix.

C. CFI Merger Agreement

In the Spring of 2011, Sunstein and Sarabhai wanted to liquidate their controlling ownership interests in BTRta, and decided to retain Eberhard Jefferson L.P. ("Eberhard") to pursue a transaction involving the sale of the company. By late summer of 2011, BTRta had received expressions of interest for a merger from CFI. (Op. 8) This culminated in a September 2011 offer of \$16.50 per BTRta share, at the time a 25% premium over market price. (Op. 8-9) Sunstein and Sarabhai were both considerably concerned and resistant due to CFI's environmental record. (Op. 9) This changed after a positive meeting with CFI: Sunstein and Sarabhai received assurances 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 in relation to the operations being acquired from BTRta. (Op. 9) CFI also increased the offer to \$17 per share.

On October 17, 2011, the BTRta board adopted a resolution approving the merger agreement. (Op. 9) A press release announcing the deal was sent out that evening. Under the merger agreement BTRta was committed to present the agreement to its stockholders for a vote. BTRta retained the right to prospect for a superior proposal for 60 days following board approval of the merger agreement. (Op. 10) A superior proposal required that, in good faith, BTRta's Board of Directors had found a new proposal that would better track the provisions of Article II of the Certificate of Incorporation. (Op. 10)

D. Ravert Ward Merger Agreement

Sunstein and Sarabhai remained uncertain about the CFI merger and its environmental impacts. (Op. 10) Early in the 60-day period, Eberhard managed to solicit a competing bid from Ravert Ward, a buy-out firm with a strong reputation for corporate social responsibility, at a price of \$13 per share. No commitment was made by either side to further pursue a deal after this initial meeting.

In late November of 2011, the 60-day window was nearing its end and BTRta had received no other bids. (Op. 11) Sunstein and Sarabhai were still concerned about CFI, and returned to negotiations with Ravert Ward. (Op. 11) At this time Ravert Ward was able to increase its offer to \$15.50 per share. (Op. 11) This price was less than the offer by CFI, but still represented a premium over market price. (Op. 11) As a condition of the offer Ravert Ward required that BTRta commit to the deal and cease shopping for competing offers. Ravert Ward required the following lockup provisions:

- Sunstein and Sarabhai would be required to execute written agreements to vote their majority voting 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.

- In the event of termination of the merger agreement BTRta would be required to pay a termination fee of \$15 million.

On December 13, 2011 the BTRta board agreed that, considering Ravert Ward's offer still represented a premium over the market price, and the environmentally responsible practices would be continued, this was a Superior Proposal within the definition stated in the CFI merger agreement. (Op. 12) The board therefore voted to approve the Ravert Ward merger in lieu of the CFI merger. Sunstein and Sarabhai also conceded to the lockup provisions requested by Ravert Ward.

Upon hearing of the Ravert Ward merger agreement, CFI counsel informed BTRta counsel that they objected and would be bringing suit to enjoin the merger with Ravert Ward. (Op. 13) This action was commenced two days later on December 16, 2011. (Op. 13)

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN ENJOINING APPELLANT FROM CONSUMMATING THE RAVERT WARD MERGER AGREEMENT, WHERE APPELLEE HAS NOT DEMONSTRATED A REASONABLE PROBABILITY OF SUCCESS AT TRIAL ON THE MERITS OF ITS ARGUMENT.

A. First Question Presented

Did the Court of Chancery err in finding that Appellee had demonstrated a sufficient probability of success at trial to enjoin BTRta from consummating its merger agreement?

B. Scope of Review

The grant or denial of a preliminary injunction is reviewed for abuse of discretion. SI Mgmt. L.P. v. Wininger, 707 A.2d 37, 40 (Del. 1998). However this court reviews questions of law, including statutory and case law interpretation *de novo*. *Lawson v. Meconi*, 897 A.2d 740, 743 (Del. 2006); *AT&T Corp. v. Lillis*, 954 A.2d 241, 251-52 (Del. 2008).

C. Merits of the Argument

The Court of Chancery erred in enjoining Appellant from consummating the Ravert Ward merger agreement, where Appellee has not demonstrated a reasonable probability of success at trial on the merits of its argument.

This Court should reverse the Court of Chancery's ruling, as BTRta's Certificate of Incorporation permits its Board of Directors to consider environmental, societal, and financial interests in the context of a change in control transaction without violating their fiduciary duties to shareholders.

II. THIS COURT SHOULD REVERSE THE COURT OF CHANCERY'S RULING AS BTRTA'S ARTICLES OF INCORPORATION PERMIT ITS BOARD OF DIRECTORS TO CONSIDER ENVIRONMENTAL, SOCIETAL, AND FINANCIAL INTERESTS, IN THE CONTEXT OF A CHANGE IN CONTROL TRANSACTION, WITHOUT VIOLATING THEIR FIDUCIARY DUTIES TO SHAREHOLDERS.

A. Second Question Presented

Does Article II of BTRta's Certificate of Incorporation act to expand the company's shareholder interest by contract, excusing the company from compulsory adherence to the holding in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

B. Scope of Review

This Court reviews questions of law *de novo*, including the interpretation of Delaware statute and contract language. *Lawson v. Meconi*, 897 A.2d 740, 743 (Del. 2006); *AT&T Corp. v. Lillis*, 954 A.2d 241, 251-52 (Del. 2008).

C. Merits of the Argument

This Court should reverse the Court of Chancery's order and lift the injunction against Appellants. 8 Del. C. § 102(B)(1) permits a corporation to utilize its articles of incorporation in order to expand and define the duty of care and fiduciary duty owed to shareholders by a corporation's Board of Directors. Article II of the BTRTA's Articles of Incorporation acts in that capacity by allowing the Board to consider environmental and societal interests, along with financial returns, in weighing the merits of a change in control transaction. BTRta acted in good faith with respect to this change, as Article II was proscribed before the public offering of the company and the shareholders were given reasonable notice of its existence. Most importantly, Article II does not interfere or impact the Board of Directors' duty of loyalty to its shareholders. Therefore, Article II

should be considered a legitimate exercise of corporate governance under the laws of the State of Delaware.

Additionally, BTRta's Board of Directors did not violate their duty of care to the company's shareholders. Under Article II, the contractually defined "best interest" of BTRta includes the long term ramifications and environmental impacts of the company. Further, Article II imposes a duty on BTRta's Board of Directors to consider these "best interests" in the context of a change in control transaction. As the Board found that Ravert Ward's merger proposal was the "best offer" after considering BTRta's environmental, social, and financial criterion, in addition to simple monetary consideration, the Board did not violate their *Revlon* duties by accepting the Ravert Ward proposal, even though the merger price was slightly lower. However, should this Court nevertheless find that *Revlon* mandates that duty of care be judged exclusively by financial criteria, this honorable Court should distinguish the instant case on the ground that a good faith exercise of social and environmental citizenship is reasonable based on principles of public policy.

i. 8 Del. C. § 102(b)(1) allows BTRta to expand and regulate the fiduciary duties, duties of care, and business judgment standards of its Board of Directors through Article II of its Certificate of Incorporation.

The core competency and mission of BTRta has been the production of forestry products using eco-friendly and sustainable practices.

(Op. 4-5). With this goal in mind, company founders Sunstein and Sarabhai sought to perpetuate these concepts through Article II of BTRta's Certificate of Incorporation, before allowing outside investors to take part in the company. (Op. 6); see Appendix P. xxxxxxxx.

Under Delaware Statutes § 102(B)(1), a corporation is permitted to use a company's Certificate of Incorporation to expand or define the Board of Directors' fiduciary duties. 8 Del. C. § 102(B)(1) (2011); see Appendix P. xxxxxxxx. These bylaws, by their very nature, are rules and procedures that bind a corporation's board and its shareholders. CA, Inc. v. AFSCME Employees Pension Plan, 953 A.2d 227 (Del. 2008). In effect, these charters and by-laws are contracts among the shareholders of a corporation, and therefore the general rules of contract interpretation are held to apply. Centaur Partners, IV v. Natl. Intergroup, Inc., 582 A.2d 923, 928 (Del. 1990). However, these rules exclude any illegal provisions of a Certificate of Incorporation, such as those that inherently conflict with a director's duty of loyalty. 8 Del. C. §§ 102(B)(1), (7) (2011); Siegman v. Tri-Star Pictures, Inc., 1989 WL 48746, *18 (1989).

In the instant case, Article II was enacted in 1997 by Sunstein and Sarabhai for the purpose of elucidating BTRta's mission to outside investors. (Op. 6-7.) When the company went public in late 2000, the Board issued a notice to potential Class A investors entitled "Risk Factors" that outlined the effects of Article II on those investors.

(Op. 5,7); see Appendix P. xxxxxxxx. The BTRta Board's actions were intended to inform potential shareholders of the Article II contractual agreement that accompanied ownership in BTRta . (Op. 5,7); see Appendix P. xxxxxxxx. Therefore, every shareholder of BTRta, including CFI, has effectively formed a contract with the company that incorporates and defines their shareholder interests as stated in the provisions of Article II. (Op. 2). Absent a declaration that Article II allows the Board to violate their fiduciary duty of loyalty, Article II is by default an enforceable declaration of all shareholders' interests, including CFI's. Therefore, CFI has no standing to challenge the legitimacy of the BTRta-Ravert Ward merger agreement, as CFI contractually agreed that the Article II criterion were consistent with its shareholder interests.

ii. Article II is not invalid or contrary to the laws of Delaware because it does not place BTRta Director interests ahead of shareholder interests, nor does it limit the liability for a Director's breach of their fiduciary duty of loyalty.

Article II does not allow BTRta's directors to avoid their fiduciary duties, including their fiduciary duty of loyalty; rather, it defines what those duties are. As such, BTRta's Board of Directors are contractually bound to include these environmental and social criteria in executing their fiduciary duties. As the shareholders had contracted with BTRta, through Article II, the directors have not

acted contrary to the laws of Delaware by considering those criteria in a change in control transaction.

The Board of Directors of a corporation owe a duty of loyalty to the shareholders of the corporation, and the company itself. Andarko Petroleum Corp. v. Panhandle E. Corp., 545 A.2d 1171, 1177 (Del. 1988); Schoon v. Smith, 953 A.2d 196, 206 n.34 (Del. 2008). This Duty generally requires, among other things, that the Board of Directors cannot "stand on both sides of the same transaction," act in bad faith toward shareholders, or engage in self-dealing. Andarko, 545 A.2d at 1174; Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006). A provision in a Certificate of Incorporation that limits liability for, or condones the violation of, a director's duty of loyalty is inconsistent with 8 Del. C. §§ 102(B)(1) and (7), and is therefore invalid as a matter of law. See Tri-Star, 1989 WL 48746 at *17-18. However, in the context of a change in control transaction, a plaintiff will be barred from relief without a requisite showing of bad faith or self-interest, where an exculpatory charter provision protects the business judgment of the Board of Directors. McMillan v. Intercargo Corp., 768 A.2d 492, 502 (Del. Ch. 2000).

In the instant case, Plaintiff has failed to allege sufficient facts to suggest that BTRta's Board of Directors have violated their duty of loyalty in the execution of the Ravert Ward merger agreement. Indeed, in its opinion, the Court of Chancery found that BTRta's Board did not engage in self-dealing behavior or bad faith actions. (Op. 2). Thus, assuming the validity of Article II, the court erred in

granting Appellee's injunction without a showing of bad faith or self-dealing.

The proper application of the law in the instant case was for the Court of Chancery to find that Article II was presumptively valid absent a showing that the Article limited the liability of Directors for acts of bad faith or-self dealing. Should the Article survive that analysis, the court would then examine any ways in the instant merger agreement that BTRta acted in bad faith or self-dealing. Absent a breach of duty of loyalty, "the plaintiff will be barred from recovery." McMillan, 768 A.2d at 502.

The Court of Chancery thus erred in this regard by presumptively determining Article II of the BTRta Certificate of Incorporation to be invalid. (Op. 15). As Appellants have argued above, Article II effectively acts as a contract between the Board of Directors and the shareholders. Centaur Partners, 582 A.2d at 928. However, in its order, the Court of Chancery presumed that the best interest of the shareholders was not what was contractually determined in the Certificate of Incorporation, and imposed a generic presumption of wealth maximization as the shareholders' best interests. (Op. 15).

This was an improper criterion for consideration. By imposing its own criterion in place of Article II, the Court of Chancery either ignored or overruled this Court's holding in *Centaur Partners*, and erred in refusing to uphold the validity of the exculpatory charter provision. Ultimately, because the Court of Chancery failed to identify any evidence of bad faith or self-dealing, both the BTRta-Ravert Ward

merger agreement and Article II are valid, and Appellee should be barred from relief, injunctive or otherwise.

iii. BTRta's Board of Directors did not breach its fiduciary duty to shareholders, as the Ravert Ward merger agreement was the "best offer" when considering BTRta's environmental, social and financial criteria, as defined in Article II.

BTRta sought out the change in control transaction with the main goal of delivering the best value to its shareholders, considering BTRta's financial, social, and environmental criterion. Although the CFI merger agreement offered a higher financial return, the Ravert Ward agreement offered the "best value" to its shareholders. The Delaware Supreme court found in its *Revlon* holding that, in the context of a change in control transaction, the Board of Directors must solicit and accept the offer with the "best value" for its shareholders. Therefore, the Court of Chancery erred in finding that the CFI agreement offered the best value, when in fact it did not offer the best value as defined in BTRta's corporate charter.

iv. The BTRta Board of Directors did not breach their duty of care, as the Ravert Ward offer was the "best value" as defined under the Article II criterion and there was no showing of bad faith.

In the context of a change in control transaction, the Board of Directors has a duty of care to the shareholders to sell the company

for the best possible value as is reasonable under the circumstances. Revlon, 506 A.2d at 182; Paramount Commun. Inc. v. QVC Network Inc., 637 A.2d 34, 48 (Del. 1994). However, the obligation to maximize shareholder value is a contextually-specific application of the directors' duty to act in accordance with their fiduciary obligations, as there is no single blueprint that a board must follow to fulfill its *Revlon* duties. McMillan v. Intercargo Corp., 768 A.2d 492, 502 (Del. Ch. 2000). "Therefore, a board's actions must be evaluated in light of relevant circumstances to determine if they were undertaken with due diligence and in good faith. If no breach of duty is found, the board's actions are entitled to the protections of the business judgment rule." Barkan v. Amsted Industries, Inc., 567 A.2d 1279, 1286 (Del. 1989).

In *Revlon*, this Court held that, during a change of control transaction, the Board of Directors has a fiduciary duty to achieve the highest sale value for their shareholders. Revlon, 506 A.2d at 182. In this case, *Revlon* was seeking to stave off a hostile takeover bid, and attempted defensive measures to increase the share price of the corporation's stock and prevent the takeover. Id. at 176-77.

Though it eventually became inevitable that the company would be bought out, the Board of Directors sought out a bidder that would make terms more favorable to the Board members' personal interests. Id. at 177-78. Using insider information and lockup provisions, *Revlon's* Board of Directors hindered the bidding process to enable their friendly bidder to win the auction. Id. at 178-79. This Court held that by interfering with the auction process, *Revlon's* Board of

Directors had breached their duty of care. Id. at 184. When it became inevitable that Revlon would be sold, the Board's role transformed into that of an auctioneer, aimed with getting the highest price for the company. Id. at 182; see also Paramount Commun. Inc. v. QVC Network Inc., 637 A.2d at 48 (interpreting *Revlon* to require a Board of Directors to search for the best value reasonably available under the circumstances).

Although the original *Revlon* standard required the Board of Directors to maximize shareholder wealth, there is an important distinction between *Revlon* and all subsequent cases: the evolution of terminology. In many interpretations of the *Revlon* holding since 1986, courts have taken extreme care to avoid the word "price" and prefer instead to use the phrase "maximization of shareholder value."

See, e.g., Paramount Commun. Inc. v. QVC Network Inc., 637 A.2d at 48; McMillan v. Intercargo Corp., 768 A.2d 492, 502 (Del. Ch. 2000); Blackmore Partners, L.P. v. Link Energy LLC, 864 A.2d 80, 85 (Del. Ch. 2004).

While *Revlon's* success standard was measured by wealth maximization, BTRta's success is determined by the overall accomplishment of its environmental and societal goals, along with its wealth maximization criterion. In the instant case, it is undisputed that the BTRta Board of Directors rejected the more profitable CFI merger offer. (Op. 2). However, based upon the application of Article II, the Ravert Ward proposal nevertheless offered shareholders the "best value" of all competing offers. (Op. 12).

According to the holdings in *McMillan* and *Barkan*, there is no generic legal blueprint that can determine the best shareholder value. Therefore, in order to prove a breach of fiduciary duty, appellee was required to show that the Ravert Ward merger was undertaken without due diligence and in bad faith. As both parties have stipulated, that is simply not the case here. (Op. 2, 12). As BTRta's Board of Directors complied with the QVC standard, acted with due diligence, and acted in good faith, the Board did not breach its duty of care with the shareholders.

III. UNDER THE APPLICABLE STANDARD OF ENHANCED JUDICIAL SCRUTINY, BTRTA'S BOARD OF DIRECTORS FULFILLED THEIR FIDUCIARY DUTY OF CARE IN APPROVING THE AGREEMENT WITH RAVERT WARD.

A. Third Question Presented

Did BTRta's Board of Directors violate their fiduciary duty of care in approving the Ravert Ward merger agreement, where the agreement contained defensive measures, including a "no-shop" or "lock-up" provision, and \$15 million termination penalty?

B. Scope of Review

This Court reviews questions of law *de novo*, including the interpretation of Delaware statute and contract language. Lawson v. Meconi, 897 A.2d 740, 743 (Del. 2006); AT&T Corp. v. Lillis, 954 A.2d 241, 251-52 (Del. 2008).

C. Merits of the Argument

BTRta's Board of Directors fulfilled its fiduciary duty of care in approving the contested agreement. The Board was adequately informed, reasonably believed in the necessity of its actions and took action that was reasonable under the circumstances. Their decision is entitled to deference under the long established business judgment rule, and survives analysis under enhanced judicial scrutiny.

i. BTRta's Board of Directors did not violate their fiduciary duty of care in implementing lockup provisions, as the provisions were necessary to avoid losing the value of the acquisition, and were reasonable under the circumstances.

When a board decides to enter into a merger transaction that will result in a change of control, enhanced judicial scrutiny is the standard of review. Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 928 (Del. 2003). Under enhanced judicial scrutiny, the directors bear the burden of demonstrating the adequacy of their decision-making process, including the information they used in making their decision and a review of the reasonableness of the substantive merits of the board's actions. Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34, 45 (Del.1993); see also Unitrin, Inc. v. American General Corp., 651 A.2d 1361 (1995) (describing reasonableness and proportionality of actions as the standard applied).

In *Omnicare*, This Court established two additional points of enhanced scrutiny. *Omnicare*, 818 A.2d at 929. In that case, Defendant NCS acquiesced to defensive provisions in a merger agreement with potential suitor Genesis as a term for the offer being made. *Id.* at 925. The defensive provisions included a “no-shop” provision, and a contractual obligation for the controlling shareholders to vote for the merger. *Id.* at 925-26. *Omnicare*, who had previously submitted a less attractive acquisition offer, then submitted a competing offer on better terms. *Id.* at 926. The court was confronted with the questions of how it should apply strict judicial scrutiny to the NCS defensive measures, and whether it should evaluate the majority stockholder voting agreements as a component of the Board’s action. *Id.* at 930. This court ruled that stockholder voting agreements may be viewed as a component of Board measures and subjected to enhanced judicial scrutiny. *Id.* at 934.

In the instant case, enhanced judicial scrutiny applies because this case is in the context of a merger transaction, meaning that this Court must examine the reasonableness and proportionality of the lockup provisions in the Ravert Ward agreement. The Board meets the standard of reasonableness, because they intentionally and rationally accepted the terms as a condition of soliciting the Ravert Ward superior offer.

Though Appellee contends that the lockup provisions in the instant case closely mirror those used in *Omnicare*, and therefore fail the proportionality standard of enhanced judicial review, the instant case is distinguishable on the facts. In the instant case, BTRta's

Board of Directors left themselves a fiduciary out, thereby mitigating the proportionality element and allowing an effective termination provision with liquidated damages in the event of a future superior offer. (Op. 12). By contrast, the majority shareholders in *Omnicare* did not leave themselves a fiduciary out, omitting a meaningful termination provision that could have prevented an irrevocable consummation of an inferior merger agreement. Omnicare, 818 A.2d at 936.

As BTRta's Board of Directors acted reasonably with proportionality to the measures proposed in the Ravert Ward merger agreement, the Board did not violate its fiduciary duties by enacting lockup provisions.

ii. Btrta's Board of Directors did not violate their fiduciary duty of care in implementing lockup provisions, as the provisions were necessary to further the shareholder's non-monetary interest in consummating the merger agreement with Ravert Ward.

The fiduciary duties of a director to the corporation and its shareholders are unremitting, and must be effectively discharged in the context of the actions and circumstances. Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 938 (Del. 2003). The decision of the Board of Directors of a target corporation to "lockup" a merger is reviewed under the *Unocal* standard of enhanced judicial scrutiny. Id. at 934 (citing Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del.1985)). In applying the *Unocal* standard, the court must

determine whether the target's Board acted in good faith and reasonable investigation in determining that there were "reasonable grounds for believing that a danger to corporate policy and effectiveness existed." Unocal, 493 A.2d at 955; Omnicare, 818 A.2d at 935. Further, the Board must thereafter prove that the defensive response was "reasonable in relation to the threat posed." Unocal, 493 A.2d at 955; Omnicare, 818 A.2d at 935.

In the instant case, the actions of BTRta's Board of Directors survive the *Unocal* test of enhanced scrutiny. First, in consideration of the context and circumstances of the merger, BTRta's Board of Directors acted in good faith and reasonable investigation in determining that there was a reasonable threat to the company's corporate policy and effectiveness, outlined in Article II of the Certificate of Incorporation. (Op. 6); (Op. 10) (reiterating that Sunstein and Sarabhai had continued misgivings about CFI's social and environmental record). It was generally uncontested that the Board of Directors acted in good faith and fair dealing. (Op. 2, 12).

Further, the investigation by Board of Directors into CFI's environmental and social qualifications was reasonably sufficient.

(Op. 12). Ultimately, the Board of Directors acted reasonably and in good faith when they determined that CFI's merger offer posed a threat to BTRta's social and environmental interests.

Second, CFI's threat to BTRta's corporate policy and effectiveness was substantial enough to warrant the lockup provisions used by the Board of Directors. The Board of Directors repeatedly contemplated CFI's environmental and social qualifications and

credibility, and decided each time that CFI was unlikely to continue BTRta's social and environmental mission should a merger occur. (Op. 9-12). Ultimately, the BTRta Board of Directors concluded that a lockup provision was needed in order to ensure that BTRta's corporate policy and effectiveness were continued, and the merger with CFI was prevented.

Therefore, as BTRta's Board of Directors acted with good faith and conducted a reasonable inquiry when determining that CFI was a threat to BTRta's corporate policy, and because the Board acted reasonably in response to that threat, the actions of the Board of Directors did not breach their fiduciary duties to the shareholders, and survive the *Unocal* standard for enhanced scrutiny.

CONCLUSION

Delaware law recognizes that corporations may contract with their shareholders to define and advance extra-monetary goals and interests, and that courts should avoid the substitution of their own judgment in place of a corporations duly elected directors, absent a violation of fiduciary duties. Based on these factors, and the facts at issue in this case, This Court should find that Appellee has no reasonable probability of success at trial on the merits of its claim. Accordingly this court should reverse the the Court of Chancery's injunction order, and allow the BTRta - Ravert Ward merger to proceed.

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8 Del. C. §102(b)

In addition to the matters required to be set forth in the Certificate of Incorporation by subsection (a) of this section, the Certificate of Incorporation may also contain any or all of the following matters:

8 Del. C. §102(b)(1)

Any provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders, or the governing body, members, or any class or group of members of a nonstock corporation; if such provisions are not contrary to the laws of this State. Any provision which is required or permitted by any section of this chapter to be stated in the bylaws may instead be stated in the Certificate of Incorporation;

8 Del. C. §102(b)(7)

A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit. No such provision shall eliminate or limit the liability of a director for any act or omission occurring prior to the date when such provision becomes effective. All references in this paragraph to a director shall also be deemed to refer to such other person or persons, if any, who, pursuant to a provision of the Certificate of Incorporation in accordance with § 141(a) of this title, exercise or perform any of the powers or duties otherwise conferred or imposed upon the Board of Directors by this title.

Article II

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.

IPO Prospectus

The Certificate of Incorporation includes a provision (Article II) that 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 or 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.