

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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BRTA FOREST PRODUCTS, INC.,	:	
a Delaware corporation, MATTHEW SUNSTEIN,	:	
VIKRAM SARABHAI, MICHAEL F. ALLEN,	:	
MILES D. LUI, KATHLEEN L. TODMAN,	:	<b>CD-ROM Version-</b>
HERBERT McCUSKER, PAULA ABAZIAN,	:	<b>to be filed</b>
JANICE L. STERN, WILLIAM D. HEMPHILL,	:	
RAVERT WARD L.P., BTR ACQUISITION CORP.,	:	
	:	
Defendants Below-	:	
Appellant,	:	
	:	
v.	:	C.A. No. 6943-CJ
	:	
CONSOLIDATED FOREST INDUSTRIES CO.,	:	
a Delaware corporation	:	Court Below—in the
	:	Court Chancery of the
	:	of State of Delaware
Plaintiff Below-	:	
Appellees,	:	

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APPELLEE'S ANSWERING BRIEF

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Team L  
Counsel for the  
Plaintiff Below-Appellee

Dated: February 10, 2012

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### NATURE OF PROCEEDINGS

This action involves the Court of Chancery's decision to grant a preliminary injunction enjoining a merger between Defendants BTRta Forest Products, Inc. ("BTRta") and Ravert Ward, L.P. ("Ravert Ward"). On October 17, 2011, Plaintiff Consolidated Forest Industries Co. ("CFI") executed a merger agreement with BTRta at \$17 per share. (Mem. Op. at 9.) Soon after, BTRta began negotiating with Ravert Ward during the agreement's grace period and accepted Ravert Ward's offer at \$15.50 per share, declaring it a "Superior Proposal" under its certificate of incorporation. (Mem. Op. at 11.) BTRta ultimately terminated the CFI merger agreement on December 13, 2011. (Mem. Op. at 13.)

Plaintiff CFI promptly brought suit to enjoin consummation of the merger. *Id.* On January 31, 2012, the Court of Chancery entered a preliminary injunction order enjoining BTRta from taking any further action consummating the Ravert Ward merger agreement. (Mem. Op. at 17.) Defendants promptly appealed, and on February 10, 2012, this Court accepted the interlocutory appeal. *Order Accepting Interlocutory Appeal, BTRta Forest Products, Inc., v. Consolidated Forest Industries Co.*, No. 142, 2012 (Del. 2012). This appeal addresses whether the Court of Chancery erred in granting CFI's motion for a preliminary injunction.

## SUMMARY OF ARGUMENT

- I. The Court of Chancery properly entered a preliminary injunction to enjoin BTRta's merger with Ravert Ward because BTRta's acceptance of Ravert Ward's proposal was a violation of the directors' fiduciary duties. The board violated their fiduciary duties by erroneously relying on non-stockholder interests in accepting one merger proposal over another, in violation of the *Revlon* mandate to focus on maximizing short-term stockholder value in the merger context. Further, the directors cannot rely on Article II of BTRta's certificate of incorporation to limit or exempt them from their *Revlon* obligations because Article II is invalid as contrary to the laws of Delaware. Article II violates Delaware corporate law because it stands in direct contravention to the fundamental fiduciary duties of loyalty and care which the *Revlon* court expounded on.
  
- II. Even if this Court finds that BTRta's board of directors did not violate *Revlon*, the Court of Chancery properly entered an order preliminarily enjoining the Ravert Ward merger because the agreement is unenforceable and invalid. When a corporation's board of directors adopts deal protection devices, which contain inherent dangers, the board must be subjected to a heightened standard of review. Thus, BTRta's adoption of the deal protection devices in the Ravert Ward agreement, triggering enhanced judicial scrutiny, fails to withstand the standard of review because they are coercive, preclusive, and inconsistent with the board's fiduciary duties.

## STATEMENT OF FACTS

### **The Parties**

Plaintiff Consolidated Forest Industries Co. ("CFI") is a Delaware corporation headquartered in Boise, Idaho, with operations throughout the United States, Canada, Brazil, Indonesia, and Central America. (Mem. Op. at 3.)

Defendant BTRta Forest Products, Inc. ("BTRta"), is a Delaware corporation headquartered in Portland, Maine, with operations from the eastern United States and Canada to Central and South American, Southeast Asia, and central Africa. (Mem. Op. at 2, 4.) Defendants Matthew Sunstein and Vikram Sarabhai are BTRta's founders, and currently members of the company's board of directors.<sup>1</sup> *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. (Mem. Op. at 5.) Class B Common Stock is entitled to ten votes per share in all matters on which the common stock votes, while the Class A Common Stock carries only one vote per share. *Id.* Sunstein, Sarabhai, and members of their families own all of the Class B Common Stock, constituting about 50.4% of the voting power for BTRta's outstanding stock. *Id.* Shares of BTRta's Class A Common Stock have traded in the range of \$13 to \$14 per share before the events giving rise to this litigation. *Id.*

Defendant Ravert Ward, L.P. ("Ravert Ward"), is a Delaware

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<sup>1</sup> Defendants Michael F. Allen, Miles D. Liu, Kathleen L. Todman, Janice L. Stern, Herbert P. McCusker, Paula R. Abazin, and William D. Hemphill are independent members of the board of directors of BTRta. Mem. Op. at 2, 4.

limited partnership based in Haverhill, Massachusetts, that specializes in arranging private acquisitions of smaller public companies.<sup>2</sup> (Mem. Op. at 2, 4.)

### **The CFI Merger Agreement**

After becoming disenchanted with their role and responsibilities in managing BTRta as a publicly held company, Sunstein and Sarabhai began exploring potential merger and acquisition transactions. (Mem. Op. at 8.) On October 17, 2011, the BTRta board ultimately approved and executed a merger agreement with CFI at \$17.00 per share. *Id.*

The CFI merger agreement allowed BTRta to terminate the merger in the event of a Superior Proposal during the 60-day grace period. (Mem. Op. at 8-9.) 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 (BTRta). (Mem. Op. at 10.) Article II of BTRta's certificate of incorporation provides that "[i]n 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 . . . effect of the Company's operations . . . on the environment and the economy of those communities and the larger world." (Mem. Op. at 6.) Article II further explains that:

Notwithstanding the foregoing, any Director is entitled to rely upon the definition of "best interests" . . . 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 . . . a Director determines to accept an offer with a lower price per share than a competing offer.  
*Id.*

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<sup>2</sup>Defendant BTR Acquisition Corp. ("BTR") is a wholly-owned subsidiary of Ravert Ward, and is the company established by Ravert Ward for purposes of the challenged merger with BTRta. (Mem. Op. at 4.)

## **The Ravert Ward Merger Agreement**

In late October, 2011, Sunstein and Sarabhai met with Ravert Ward's principles to discuss the acquisition of BTRta by Ravert Ward. (Mem. Op. at 10.) The initial meeting with Ravert Ward ended without any commitment because Ravert Ward was emphatic in its position that \$13 per share was the most it could offer. *Id.* In late November, 2011, however, Sunstein and Sarabhai went back to Ravert Ward to see if there was any flexibility on price and other terms. *Id.* Ravert Ward was receptive and eventually agreed to offer \$15.50 per share in cash for BTRta's stock - considerably less than the CFI merger agreement's \$17 per share price<sup>3</sup>. *Id.*

As part of the Ravert Ward merger agreement, Ravert Ward insisted on the following conditions:

(1) 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; (2) The board of directors of BTRta would be required to present the merger agreement to a vote of its stockholders . . . even if the board no longer considered the Ravert Ward merger desirable; (3) BTRta would not be permitted to solicit any competing merger proposal prior to the stockholder vote on the merger; and (4) BTRta would be required to pay Ravert Ward a termination fee of \$15 million in the event of a termination of the merger with Ravert Ward. (Mem. Op. at 12.)

On December 13, 2011, after concluding that the Ravert Ward merger agreement was a Superior Proposal because it would alleviate BTRta's environmental concerns, BTRta executed the Ravert Ward merger agreement and terminated the CFI merger agreement. *Id.*

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<sup>3</sup> Ravert Ward assured BTRta that BTRta's operations would continue to be managed in accordance with its previous environmentally responsible practices, and that Sunstein and Sarabhai would have an active consulting role in implementing that commitment. (Mem. Op. at 10.)

The following day, counsel for CFI informed counsel for BTRta that CFI objected to the Ravert Ward merger, considered it a violation of BTRta directors' fiduciary duties, and would promptly bring suit to enjoin consummation of the merger. (Mem. Op. at 13.) CFI, which owns 4,300 shares of common stock of BTRta, obtained a preliminary injunction against consummation of the Ravert Ward merger agreement on January 26, 2012. *Id.*

## ARGUMENT

### **I. THIS COURT SHOULD AFFIRM THE COURT OF CHANCERY'S DECISION BECAUSE BTRTA'S DIRECTORS BREACHED THEIR FIDUCIARY DUTY TO STOCKHOLDERS UNDER DELAWARE CORPORATE LAW IN TERMINATING THE CFI MERGER AGREEMENT AND ACCEPTING A MERGER WITH RAVERT WARD INSTEAD.**

#### **A. Question Presented**

Whether a corporation's board of directors breaches its fiduciary duty under Delaware corporate law by relying on non-stockholder interests in failing to accept the highest-priced proposal in the context of a corporate merger.

#### **B. Scope of Review**

Delaware courts review the grant of a preliminary injunction without deference to the embedded legal conclusions of the trial court. Therefore, this Court reviews all of the Court of Chancery's legal conclusions de novo. See *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 394 (Del. 1996).

#### **C. Merits of Argument**

To obtain a preliminary injunction, a party must demonstrate: "(1) a reasonable probability of success on the merits at a final hearing; (2) an imminent threat of irreparable injury; and (3) a balancing of the equities [that] tips in its favor." *Zrii, LLC v. Wellness Acquisition Group, Inc.*, 2009 Del. Ch. LEXIS 167, \*24 n.93 (Del. Ch. Sept. 21, 2009). In this case, the parties have agreed that if CFI is able to demonstrate a reasonable probability of success on the merits, a preliminary injunction would be appropriate. (Mem. Op. at 13).

## 1. THE BOARD OF DIRECTORS' MERGER DECISION VIOLATES THE REVLON MANDATE

BTRta's board of directors heavy reliance on non-stockholder interests in evaluating competing merger proposals violated the mandate announced by the Delaware Supreme Court in the seminal *Revlon* case. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986). While it is a basic principle of Delaware law that a corporation's board of directors is generally under no obligation to propose or approve a sale of the company (See *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985)), this Court held in *Revlon* that a special obligation is created once the board makes the decision to sell or relinquish control of the company. Specifically, the court held that once a change in control of the company is "imminent," the board's duty changes from "the preservation of ... [the] corporate entity to the maximization of the company's value at a sale for the stockholders' benefit." *Revlon*, 506 A.2d at 182.

Further, this Court made clear that once the decision is made to give up control of the company, "the directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company." *Id.* Delaware courts have also been careful to note that a board of directors in a *Revlon* situation is not obligated to be a completely neutral seller, but that "the board may tilt the playing field if, but only if, it is in the shareholders' interest to do so." *In re J.P. Stevens & Co., Inc. Shareholders Litigation*, 542 A.2d 770, 782 (Del. Ch. 1988). This is because "it is the shareholders to whom the board owes a duty of fairness, not to persons seeking to acquire the

Company." *Id.* This Court in *Revlon* also made clear that "concern for non-stockholder interests is inappropriate when an auction among active bidders is in progress, and the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder." *Revlon*, 506 A.2d at 182.

In this case, BTRta's board of directors was obligated to follow the *Revlon* mandate as of May 18, 2011, when the board unanimously resolved to begin the process of identifying and eliciting bids to acquire the entire equity of BTRta. (Mem. Op. at 8). Pursuant to *Revlon*, the board's sole duty at this point became ensuring that they received the maximum value for the stockholders through agreeing to the merger bid with the highest price per share. *Cite.* CFI's bid of \$17 per share was significantly higher than Ravert Ward's bid of \$15.50 per share, therefore under *Revlon*, BTRta's board was obligated to accept CFI's offer and thereby maximize their stockholders short-term value by accepting the highest price. Instead, the board of directors based its decision to go with Ravert Ward's proposal on non-stockholder interests, specifically their belief that Ravert Ward was more likely to continue the type of environmentally conscious practices that BTRta's board favored. This decision clearly violates this Court's holding in *Revlon*, and improperly put the interests of other constituencies ahead of the stockholders.

**2. BTRTA'S BOARD ERRONEOUSLY RELIED ON ARTICLE II BECAUSE IT IS CONTRARY TO THE LAWS OF DELAWARE REGARDING THE FIDUCIARY DUTY OF DIRECTORS**

To justify their reliance on non-stockholder interests in making the merger decision in question, and evade their obligations under

*Revlon*, BTRta's board points to Article II of the company's certificate of incorporation. Under Delaware corporate law, a company may include any provision within its certificate of incorporation that involves "creating, defining, limiting and regulating the powers of ... the directors," as long as "such provisions are not contrary to the laws of this State." 8 Del. C. § 102(b)(1) (2011). In this case, Article II expressly allowed for BTRta's directors to take into account non-stockholder interests—such as impact on the environment and community economy—when making company decisions. (Mem. Op. at 6.) Furthermore, Article II provided that consideration of these non-stockholder interests was not to be considered a breach of the director's fiduciary duty, even in the context of a Change in Control Transaction. *Id.*

While Article II of BTRta's certificate of incorporation certainly defines and limits the power of the company's directors, this provision does not fall within the meaning of Section 102(b)(1) because it is contrary to Delaware law as laid out in the *Revlon* mandate discussed above. See 8 Del. C. § 102(b)(1) (2011). While the *Revlon* mandate is not expressly stated within Delaware statutory law, its roots lie within one of the cornerstones of Delaware corporate law: the fiduciary duties of directors. Delaware courts have understood that "although an important comment on the need for heightened judicial scrutiny when reviewing situations that present unique agency cost problems, *Revlon* did not fundamentally alter Delaware's corporate law." *In re Lukens Inc. Shareholders Litigation*, 757 A.2d 720, 731 (Del. Ch. 1999). Instead, the Delaware Supreme Court has recognized

"Revlon did not create any new fiduciary duties. It simply held that the 'board must perform its fiduciary duties in the service of a specific objective: maximizing the sale price of the enterprise.'" *Lyondell Chemical Co. v. Ryan*, 970 A.2d 235, 239 (Del. 2009) (citing *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001)). More specifically, "'Revlon duties' refer only to a director's performance of his or her duties of care, good faith and loyalty in the unique factual circumstance of a sale of control over the corporate enterprise." *Id.* Therefore Revlon simply made clear that "a director's duty in conducting a sale of corporate control is to seek out, in a manner consistent with his or her triad of fiduciary duties, 'the best value reasonably available to the stockholders.'" *In re Lukens Inc.*, 757 A.2d at 731.

As a result, "a corporate board's failure to obtain the best value for its stockholders may be the result of illicit motivation (bad faith), personal interest divergent from shareholder interest (disloyalty) or a lack of due care." *Id.* In this case, Article II is not unenforceable because it is simply contrary to "new duties" created in the *Revlon* decision, but also because it stands in direct contravention of the fundamental fiduciary duties of loyalty and care which the *Revlon* court was expounding on.

#### **i. Article II is Contrary to the Directors' Duty of Loyalty**

Article II is unenforceable because it runs counter to one of the basic foundations of corporate law: a directors' fiduciary duty of loyalty. In outlining this duty, the Supreme Court of Delaware has

stated that "essentially, the duty of loyalty mandates that the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally." *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993). Further, "the rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest." *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939).

Delaware corporate law has provided for the limitation of director liability as a result of fiduciary breaches in some contexts. Particularly, under Section 102(b)(7) of the Delaware General Corporation Law, stockholders can adopt provisions within a company's certificate of incorporation that limit or eliminate director liability for breaches of their fiduciary duties. Del. Ann. tit. 8, § 102(b)(7) (2011). But, of particular relevance in this matter, Section 102(b)(7) expressly disallows provisions, which limit director liability "for duty of loyalty violations, good faith violations and certain other conduct." *Id.* More specifically, Delaware courts have held that to "eliminate or limit the liability of [] directors for breach of their fiduciary duty of loyalty - - [is] a result proscribed by §102(b)(7)." *Siegman v. Tri-Star Pictures, Inc.*, 1989 Del. Ch. LEXIS 56 (Del. Ch. May 5, 1989, revised May 30, 1989).

In the *Revlon* context, the duty of loyalty operates to ensure that the directors' focus will be on the maximization of stockholder value through obtaining the highest possible price per share once a decision has been made to sell the company. Specifically, Delaware

courts have held that directors violate their duty of loyalty in this context if they “utterly failed to attempt to obtain the best sale price.” *Lyondell*, 970 A.2d at 244.

In this case, Article II attempts to severely curtail, or even eliminate the directors’ fiduciary duty to the company’s stockholders by allowing the board to place a heavy emphasis on non-stockholder interests when crafting a merger agreement. (Mem. Op. at 7.) In the context of director liability for monetary damages, Section 102(b)(7) made a point to expressly provide that the duty of loyalty cannot be limited or curtailed within a company’s certificate of incorporation. That same reasoning applies to Article II in the situation at issue, where a certificate of incorporation attempts to limit the duty of loyalty in a Change of Control Transaction. Article II purports to allow BTRta’s directors to completely ignore the primacy of getting the best available price for their stockholders, and instead condones the consideration of merger offers in regards to what is best for the environment in general and principles of long-term corporate governance. (Mem. Op. at 6.) While these may be noteworthy and important objectives, *Revlon* and its subsequent progeny make clear that the fiduciary duty of loyalty in this context requires that directors solely focus on maximizing short-term stockholder value by obtaining the highest possible price per share. *Lyondell*, 970 A.2d at 244. Accordingly, BTRta’s directors were disloyal because their merger decision was clearly the result of a “personal interest divergent from shareholder interest”, namely concern for the environment and long-term corporate policy of the bidder. *In re Lukens Inc.*, 757 A.2d at

731. Therefore, to the extent that Article II purports to modify the directors' duty of loyalty in a Change of Control Transaction, placing other interests before those of stockholders, it is contrary to the laws of Delaware.

**ii. Article II is Contrary to the Directors' Duty of Care**

Article II is also contrary to Delaware law so far as it attempts to limit or eliminate the directors' duty of care during a sale of control. Within this context, the duty of care operates to ensure that the directors take all reasonable steps to accomplish the maximization of stockholder value mandated by the duty of loyalty. See *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 44 (Del. 1993). Delaware courts have stated that "in determining which alternative provides the best value for the stockholders, a board of directors is not limited to considering only the amount of cash involved, and is not required to ignore totally its view of the future value of a strategic alliance." *Id.* However, these considerations must be viewed through the singular focus of obtaining the best value for the corporation's stockholders. More specifically, while the duty of care in a merger context may involve complex analysis and the gathering of a wide variety of relevant data, "the board's goal is straightforward: Having informed themselves of all material information reasonably available, the directors must decide which alternative is most likely to offer the best value reasonably available to the stockholders." *Id.* at 45.

Examples of "other" permissible stockholder considerations include a bidder's ability to finance their cash portion of the

merger, the definiteness of a bidder's proposal, and other considerations relating directly to the reliability and concreteness of a particular bidder's offer. See *Mills Acquisition Co. v. MacMillan, Inc.*, 559 A.2d 1261, 1282 (Del. 1989); see also *Citron v. Fairchild Camera and Instrument Corp.*, 569 A.2d 53 (Del. 1989). Common to all of these "other" considerations outside of pure price is that they have a substantial connection to the goal of obtaining the best possible short-term value for the corporation's stockholders. In stark contrast here are the environmental and corporate governance considerations which BTRta's board focused on that bear little to no relation to the goal of ensuring BTRta's stockholders come out of the merger process with the highest possible cash value for their investment.

Furthermore, while Delaware law under Section 102(b)(7) does allow for a corporation to limit directors' duty of care through a provision within the company's certificate of incorporation, it is important to note that this limitation only applies in the context of director liability for monetary damages. 8 Del. C. § 102(b)(7) (2011). Notably absent from Section 102(b)(7) is any provision allowing a corporation to limit the scope of the directors' duty of care, or to extinguish it completely. *Id.* Pursuant to the this implicit reading of Section 102(b)(7), Article II cannot be construed to modify the duty of care of BTRta's directors to permit analysis and focus on non-stockholder interests. Otherwise, Article II would inhibit the fundamental principle found in *Revlon* that "[m]arket forces must be allowed to operate freely to bring the target's shareholders the best

price available for their equity." *Revlon*, 506 A.2d at 184. Therefore, Article II is contrary to the laws of Delaware, and therefore invalid and unenforceable.

**II. THE SUPREME COURT OF DELAWARE IN *OMNICARE* PROPERLY DECIDED THAT DEAL PROTECTION DEVICES RESULTING IN A "LOCKED-UP" MERGER TRANSACTION ARE SUBJECT TO ENHANCED JUDICIAL SCRUTINY, UNDER WHICH THE RAVERT WARD AGREEMENT FAILS.**

**A. Question Presented**

Whether deal protection devices that lock up a merger agreement and contain inherent dangers, such as subsuming stockholder vote and neglecting stockholder interest, should be judicially reviewed under enhanced scrutiny standard.

**B. Scope of Review**

The Chancery Court's decision to enter a preliminary injunction based on the Delaware Supreme Court's holding in *Omnicare* is a question of law. "Questions of statutory interpretation are questions of law that this Court reviews *de novo*." *Dambro v. Meyer*, 974 A.2d 121, 129 (Del. 2009).

**C. Merits of Argument**

Even if this Court declines to rule that the Ravert Ward agreement violates the mandate in *Revlon*, the merger is invalid because it cannot withstand judicial review under enhanced scrutiny. There are inherent dangers present in deal protection devices that run counter to existing precedent and Delaware corporation law. Such devices require courts to take a more active role in examining a board of director's decision. Accordingly, the board's adoption of the

defensive devices in the Ravert Ward agreement, triggering a heightened standard of review, cannot survive the applicable judicial scrutiny and are thus unenforceable and invalid.

**1. OMNICARE CORRECTLY DECIDED THAT ENHANCED SCRUTINY IS THE PROPER STANDARD FOR EVALUATING DEAL PROTECTION MEASURES DUE TO THEIR INHERENT DANGERS**

When a board of directors adopts deal protection devices that lock up a merger transaction, there are inherent dangers that require a court to apply enhanced judicial scrutiny as the standard of review. Identification of the correct analytical framework is essential to properly reviewing a challenge to a board of directors' decision. *Omnicare, Inc. v. NCS Healthcare Inc.*, 818 A.2d 914, 927 (Del. 2003). While the default "business judgment rule," which attributes deference to managerial decisions of the directors, is applied to "normal circumstances," there are certain circumstances that require the court to take a more active role in overseeing a board's decision. *Id.* at 928. This Court has identified various circumstances where a board must withstand enhanced judicial scrutiny before invoking the deferential business judgment rule. *Id.* at 928.

In *Unocal*, this Court held that when a board adopts defensive devices, "there is an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred." *Unocal*, 493 A.2d at 954 (Del. 1985). The *Unocal* standard is a "flexible paradigm" that applies to the myriad of situations dealing with corporate boards' decisions. *Paramount Communications, Inc. v. Time Inc.*, 571 A.2d 1140, 1153 (Del. 1989).

One situation that calls for the *Unocal* heightened standard of review is when a board of directors adopts deal defensive measure to protect a merger transaction. See *Omnicare*, 818 A.2d at 927. This Court has "repeatedly stated that the refusal to entertain an offer may comport with a valid exercise of a board's business judgment." *Time*, 571 A.2d at 1151. Thus, once a board adopts deal protection devices that no longer allow for other offers, there are inherent dangers that require enhanced judicial scrutiny as the applicable standard of review.

**i. Deal Protection Measures May Render Stockholder Vote Ineffective**

A possible danger inherent in deal protection devices is that by adopting such measures, a board of directors will render stockholder vote ineffective by "impermissible coercion." *Omnicare*, 818 A.2d at 936. For this reason, deal protection devices interfering with and impeding the effectiveness of stockholders' votes are subject to enhanced judicial scrutiny. *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1374 (Del. 1995). This Court noted in *Unitrin* that in "transactional justification cases involving the adoption of defenses to takeovers, the director's actions invariably implicate issues affecting stockholder rights." *Id.* at 1374; see *Revlon*, 506 A.2d at 180 n.10. In such cases, a board's decision must be "reviewed judicially and the burden of going forward is placed on the directors." *Unitrin*, 651 A.2d at 1374; see also Joseph Hinsey, IV, *Business Judgment and the American Law Institute's Corporate Governance Project: the Rule, the Doctrine and the Reality*, 52 Geo.Wash.L.Rev.,

609, 611-13 (1984).

Delaware corporate statutes also provide that a board's "decision to enter into and recommend a merger transaction can become final only when ownership action is taken by a vote of the stockholders." *Omnicare*, 818 A.2d at 930. Under Delaware General Corporation Law (the "DGCL"), a board of directors must submit a merger agreement to the stockholders for a vote. 8 Del. C. § 251(c) (2011). Accordingly, if a board adopts deal protection devices rendering stockholder vote moot, the consummation of the merger is unenforceable under *Unocal*. *Omnicare*, 818 A.2d at 935.

Therefore, the danger of deal protection devices lies in their use to invalidate the vote of stockholders and thus create a *fait accompli*. *Id.* at 936. In *Omnicare*, this Court determined that by adopting the deal protection devices, the board robbed stockholder vote "of its effectiveness by the impermissible coercion that predetermined the outcome of the merger." *Id.* The Supreme Court of Delaware determined that such an agreement is unenforceable. *Id.* Because the danger of a *fait accompli* exists when deal protection measures are introduced in light of a merger agreement, and such measures run counter to precedent and Delaware corporation law, a board's decision to adopt these measures must face a heightened standard of review.

The present case illustrates this danger inherent in deal protection devices. The Ravert Ward agreement required both Sunstein and Sarabhai to execute written agreements voting all of their shares in favor of the merger. (Mem. Op. at 12.) Because Sunstein and

Sarabhai and members of their families constitute about 50.4% of the voting power of BTRta's outstanding stock, by adopting Ravert Ward's protective devices the outcome of the merger became predetermined and the stockholders' votes became a *fait accompli*. (Mem. Op. at 6.) Thus, the necessity for this Court to examine the Ravert Ward agreement under enhanced judicial scrutiny is further enforced so as to prevent stockholders from being robbed of an effective vote for or against the agreement.

**ii. Deal Protection Measures Implicitly Include a Conflict of Interest Between a Board of Directors and Stockholders**

Deal protection devices contain an inherent conflict of interest issue between a board and its stockholders and thus must be subjected to enhanced judicial scrutiny standard of review. This Court has recognized that directors are often confronted with an " 'inherent conflict of interest' during contests for corporate control '[b]ecause of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders.'" *Unitrin*, 651 A.2d at 1373 (quoting *Unocal*, 493 A.2d at 954). In such situations, this Court has emphasized that before a board is accorded deference under the protection of the business judgment rule, the board must pass under enhanced judicial scrutiny standard of review. *Id.*

Delaware corporation law parallels this idea of a *shared* enterprise and ownership decision in the case of merger transaction as it provides for a *balance* of power among the boards and stockholders. See 8 Del. C. § 251(c) (2011). Thus, when a board of directors makes a

decision to adopt deal protective devices to secure a merger agreement, it implicates the stockholders' right to effectively vote contrary to the board's recommendation. *Omnicare*, 818 A.2d at 930 (citing *MM Companies v. Liquid Audio, Inc.*, 813 A.2d 1118, 1120 (Del. 2003)). The "omnipresent specter" of such conflict is especially present when the board adopts defensive measures to lock up a merger agreement in their favor. *Id.*

As evident in the present case, the deal protection devices present in the Ravert Ward agreement must be examined under enhanced judicial scrutiny because failing to do so jeopardizes stockholders' interests. In fact, the stockholders' interests were completely ignored when Sunstein and Sarabhai accepted the terms of the Ravert Ward agreement. Because Sunstein and Sarabhai were primarily interested in a merger that would uphold BTRta's environmentally responsible practices, they adopted Ravert Ward's agreement with deal protection devices that essentially locked up the Ravert Ward merger. (Mem. Op. 11-12.) In adopting such devices, BTRta's board failed to take the stockholders' interests into account and the balance of power diminished. As a result, BTRta's stockholders could no longer seek the highest value or vote in favor the CFI agreement, which offered BTRta stockholders the highest price per share. (Mem. Op. at 11.) Thus, this Court must apply a heightened standard of review to allow for the stockholders to retain a balance of power and adopt a shared decision.

**2. THE RAVERT WARD MERGER AGREEMENT DOES NOT SURVIVE THE ENHANCED SCRUTINY OF THE OMNICARE STANDARD**

The deal protection devices adopted by BTRta's board in the

Ravert Ward agreement cannot withstand enhanced judicial scrutiny standard of review. By adopting deal protective measures in the Ravert Ward agreement, Sustein and Sarabhi subjected the board's decision to the intermediate standard of enhanced scrutiny. See *Time*, 571 A.2d at 1151. Applying the first prong of *Unocal's* two-stage analysis, the directors must show that "they have reasonable grounds for believing that a danger to corporate policy and effectiveness existed..." *Unocal*, 493 A.2d at 955. To satisfy this burden, directors must show that they acted in good faith after conducting a reasonable investigation. *Omnicare*, 818 A.2d at 935.

In the present case, BTRta's board fails to demonstrate that they acted in good faith after conducting a reasonable investigation. Unlike *Omnicare*, where the board was threatened by the "possibility of losing the Genesis offer and being left with no comparable alternative transaction," BTRta's board had an existing agreement with the plaintiffs that they were satisfied with. (Mem. Op. at 7,9.) The board had no reasonable ground to believe a threat existed because even if the Ravert Ward agreement fell through, they had signed a comparable—and superior—agreement with the Plaintiffs in the CFI Merger Agreement. (Mem. Op. at 7-8.)

Even if this Court finds that BTRta's board demonstrated good faith in adopting the defensive measures in response to a threat, the board's decision to adopt the Ravert Ward agreement fails the second stage of the *Unocal* test. Under the second prong of the *Unocal* analysis, the board of directors must illustrate that its defensive response was "reasonable in relation to the threat posed." *Unocal*, 493

A.2d at 955. This step entails a two-part analysis: first the directors must demonstrate that the threat was not “coercive” or “preclusive” and then they must show that their response was within a “range of reasonableness.” *Omnicare*, 818 A.2d at 935.

Here, BTRta’s board adopted measures that were designed to coerce the consummation of the Ravert Ward merger and preclude CFI from presenting a counter offer. The majority stockholders here, with only .4% more voting power than the remainder of shareholders, accepted the defensive devices that robbed the *slight* minority of their votes. (Mem. Op. at 5.) By accepting the terms of the Ravert Ward agreement, stockholders votes were rendered moot and the board was able to make their decision based on their own self-interest. (Mem. Op. at 5.) The board’s response precluded the stockholders from seeking better offers and precluded CFI from presenting a more favorable counter offer. Thus, the terms of the Ravert Ward agreement fail under the second stage of *Unocal*’s enhanced judicial scrutiny and are thus unenforceable.

Not only were the deal protection devices in the Ravert Ward agreement unenforceable because they fail both prongs of the *Unocal* two-stage analysis, they are also invalid because the merger agreement required BTRta’s board to abdicate its fiduciary duties. See *QVC*, 637 A.2d at 51. As this Court recognized in *QVC*, “minority stockholders must rely for protection solely on the fiduciary duties owed to them by the directors.” *Id.* at 43. Circumstances in which a group of stockholders with majority voting power commits itself to a merger transaction that renders the outcome of the stockholders’ votes a “foregone conclusion,” the board cannot abandon its fiduciary duties

to the minority. *Omnicare*, 818 A.2d at 937. This Court has consistently invalidated mergers in which a board accepts deal protection devices that lock up the agreement without negotiating a fiduciary out clause to protect stockholders in the event of a superior offer. *Id.*; see also *QVC*, 637 A.2d at 43.

As in *QVC* and *Omnicare*, BTRta's board failed to negotiate a fiduciary out clause to protect its stockholders in the event of a superior offer. Not only did BTRta's board fail to exercise its own fiduciary obligations at a time when its judgment was most important, it also failed obtain the best value for the stockholders, limiting the free market of deal making. A decision to adopt deal protection devices that lock up merger transactions requires a heightened standard of review because its dangers—robbing stockholders of their right to vote effectively and diminishing the balance of power—far outweigh any speculative benefits. BTRta's two majority stockholders' decision to adopt deal protection measures is subjected to enhanced judicial scrutiny, and subsequently, fails to withstand under the proper standard of review.

**CONCLUSION**

For the foregoing reasons, this Court should affirm the Court of Chancery's grant of a preliminary injunction enjoining BTRta's merger with Ravert Ward.

Respectfully Submitted,

/s/

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Law Firm L  
Attorneys for Respondent