

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BTRTA Forest Products, Inc., a Delaware
corporation, MATTHEW SUNSTEIN,
VIKRAM SARABHAI, MICHAEL F. ALLEN,
MILES D. LIU, KATHLEEN L. TODMAN,
HERBERT McCUSKER, PAULA ABAZIAN,
JANICE L. STERN, WILLIAM D. HEMPHILL,
RAVERT WARD L.P., and BTR ACQUISITION
CORP.,

No. 142, 2012

Defendants Below -
Appellants,

v.

CONSOLIDATED FOREST INDUSTRIES CO.,
a Delaware corporation,

Plaintiff Below -
Appellee.

OPENING BRIEF FOR APPELLANT

ORAL ARGUMENT REQUESTED

TEAM P

Attorneys for Appellee,
Plaintiff- Below

February 10, 2012

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NATURE OF THE PROCEEDINGS

This case comes before the Delaware Supreme Court on appeal from the Court of the Chancery, finding for the Plaintiff, Consolidated Forest Industries (“CFI”), a Delaware corporation. This case involves a merger agreement that was terminated by the Defendant, BTRta Forest Products Inc. (“BTRta”). BTRta terminated the merger with CFI based purely on the interests of the community and failed to adequately consider the interests of the BTRta shareholders. BTRta then entered into another merger agreement with Ravert Ward, which was effectively locked up. The Plaintiff, CFI, seeks a preliminary injunction against the consummation of the later merger in order to protect the interests of the BTRta shareholders and CFI’s own interest as a bona fide bidder.

The Plaintiff moved for a Preliminary Injunction Order to prevent the merger between BTRta and Ravert Ward. The Court of the Chancery held that BTRta’s board of directors engaged in a violation of well settled Delaware case law¹ and granted the injunction. The defendant-appellants made application pursuant to Supreme Court Rule 42 for an order certifying an appeal from the interlocutory order of the Court of Chancery dated January 31, 2012. The Delaware Court of the Chancery certified the interlocutory appeal to the Delaware Supreme Court, which the Court has granted; scheduling oral arguments for March 15, 2012.

¹ The lower court found a clear violation of the doctrines derived from *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.* 506 A.2d 173 (Del. 1986) and *Omnicare, Inc. v. NCS Healthcare, Inc.* 818 A.2d 914 (Del. 2003).

SUMMARY OF THE ARGUMENT

This case involves the breach of fiduciary duties owed from a board of directors to shareholders of the corporation, and the board's reliance on an Article in the corporation's certificate of incorporation that violated the Delaware General Corporate Laws.

The Court of the Chancery granted the Plaintiff's motion for a preliminary injunction in this case based on the conclusion that the Plaintiff was likely to succeed on the merits at a final hearing. The Defendant, BTRta, who accepted a merger proposal that gave the shareholders considerably lower value for their shares than the proposal offered by the Plaintiff, broke from clearly established Delaware Supreme Court law and permitted the board to consider outside interests over the interests of the stockholders. CFI, as a bona fide bidder, brought suit to enjoin BTRta's unlawful actions.

The board of directors of any corporation established under Delaware law owes two primary duties to its shareholders: the duty of loyalty and the duty of care. These duties generally require the board to hold the interests of the shareholders above the interests of outside parties. More specifically, the duty of loyalty requires the board to always act in the best interests of the shareholders. The duty of care requires the board to ensure that shareholders are able to get the maximum value for their shares when a sale of the company becomes inevitable.

The defendant, BTRta, has violated long standing case precedent which puts a burden on the board to show that they have reasonable grounds to believe that a danger to corporate policy and effectiveness existed because of another's stock ownership before locking up a deal in favor of another bidder. Furthermore, the BTRta board's actions were draconian and unreasonable, which is a violation of fiduciary duties owed to shareholders.

STATEMENT OF THE FACTS

The Plaintiff, CFI, is a publicly-traded Delaware corporation with operations all over the world. It is one of the largest producers of paper and wood products. (Op. at 3). The Defendant, BTRta, a Delaware Corporation, manufactures products such as specialty papers. The Defendants Matthew Sunstein and Vikram Sarabhai are the founders and are currently members of the BTRta board. Sunstein and Sarabhai they have served as co-chief executives since BTRta's founding. (Op. at 4). Together the two own 50.4% of the voting power of all of BTRta's outstanding stock. (Op. at 5-6). The other Defendants are members of BTRta's board of directors. Defendant Ravert Ward is an acquisition firm and it created BTR Acquisition Corp. for the merger with BTRta. (Op. at 4).

BTRta has two classes of Common Stock, Class A and Class B, with 25,267,042 shares of Class A common stock outstanding and 2,567,042 shares of Class B outstanding. (Op. at 5). Class B shares are entitled to ten votes per share while Class A stock only carries one vote per share. Sunstein and Sarabhai and their families own all of the Class B stock (Id.). The director defendants own 2,154,687 shares of Class A Common Stock (Op. at 4). The next largest stockholders of BTRta are institutional investors, holding between 0.5% and 1.1% of the Class A Common Stock. (Op. at 6).

In April 2011, Sunstein and Sarabhai decided that it would best for them to shed their responsibilities of controlling ownership. (Op. at 8). CFI expressed interest in acquiring BTRta. (Id.). CFI made an initial merger offer at a price of \$16.50 per BTRta share, which was a 25% premium over the market price. (Op. 8-9). Sunstein and Sarabhai were disenchanted with size of CFI's operations and other factors besides the value offered to their shareholders. (Op. at 9). The founders apparently questioned CFI's ability to maintain high environmental standards. (Id.). To

ease Sunstein and Sarabhai's concerns, CFI offered the two of them consulting positions on the Environmental Committee of CFI's board of directors. Furthermore, CFI also increased its offer to \$17 per share. (Id.). On October 17, 2011, the BTRta board adopted the merger agreement and announced the merger to the press. (Id.). BTRta was given the ability to seek out and terminate the merger in the event of a Superior Proposal during a 60-day period following the board approval of the merger. (Op. at 10). As defined in the agreement, a Superior Proposal permitted the board of directors to consider Article II of BTRta's certificate of incorporation.

Article II of BTRta's certificate of incorporation is the core of this dispute. (Op. at 6). This Article was adopted prior to the company going public in 2000. (Op. at 7; 5). The Article purports to command the board of directors to consider "long-term economic prospects" and also social and economic effects of actions taken by the company.² Article II permits the directors to consider the impact of certain company actions on the communities where the business operates and on the environment. Article II also seeks to protect the directors against breach of fiduciary duty claims "as a result of weighing other Stakeholders' interests" besides the shareholders, even when there is a "Change in Control Transaction." (Op. at 6). This type of transaction includes a merger where BTRta's stock is exchanged for cash. (Id.). BTRta attempted to explain Article II under the "Risk Factors" section of its prospectus that was issued in connection with the offering of its Class A Common Stock.³ The risk factors described Article II as a provision that allowed the directors to consider the interests of outside stakeholders even if this meant that shareholder value would not be maximized. (Op. at 7). These considerations were permitted even in the "of a sale of the company or other" change of control transactions. (Id.).

² The Article in its entirety can be found on page 6 of the Chancery Court Opinion.

³ The section in its entirety can be found on page 7 of the Chancery Court Opinion.

After BTRta's adoption of the CFI merger proposal on October 17, 2011, Sunstein and Sarabhai continued to have misgivings about CFI's ability to consider non-shareholder interests. (Op. at 10). BTRta's financial advisor, Eberhard Jefferson L.P., (Op. at 8), put the two in contact with the Defendant, Ravert Ward. However, Ravert Ward was initially only willing to pay \$13 per share, which was a substantially lower price than the offer from CFI. (Op. at 11). In November of 2011, Ravert Ward raised its offer price to \$15.50 per share for BTRta's stock, which was still significantly lower than CFI's offer of \$17 per share. Ravert Ward, like CFI, also offered Sunstein and Sarabhai consulting roles with the new management. (*Id.*). However, Ravert Ward made several demands to consummate the merger, including that the two founders would vote all of their shares in favor of the merger. Furthermore, BTRta was not permitted to entertain other proposals, and BTRta would be required to pay Ravert Ward a \$15 million termination fee in the event of a termination. (Op. at 12). This agreement makes the stockholders' vote a foregone conclusion, as the founders control 50.4% of the votes and are required to vote in favor of the merger.

The board adopted the offer on December 13, 2011, based on the likelihood that BTRta's environmental practices would continue and this would be in the interest of the community and society. (Op. at 12). However, the board does not appear to have given much thought to the fact that the offer price was considerably lower than the merger offer received from CFI. CFI informed BTRta that it considered the decision to be a violation of the board's fiduciary duties, and this action was brought on December 16, 2011.

ARGUMENT

The standards for evaluating a motion for a preliminary injunction are well settled in this Court. This Court stated in *ZRii, LLC v. Wellness Acquisition Group, Inc.*, “[t]he Court may grant a preliminary injunction where the moving party demonstrates: (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.” 2009 WL 2998169, 8 (Del. Ch. 2009). The Defendants concede that if CFI demonstrate a reasonable probability of success on the merits at a final hearing, a preliminary injunction should be granted. Therefore, CFI only needs to satisfy prong (1) of this inquiry, and prove that CFI has a reasonable probability of success on the merits.

CFI will prove that it has a reasonable probability of success on the merits by showing the following: (1) Article II of BTRta’s certificate of incorporation is unenforceable under Delaware law; and (2) that *Omnicare* is still good law; therefore, the lock up created by the BTRta board violates fiduciary duties owed to shareholders.

I. Article II forces the Board of Directors of BTRta to consider non-stockholder interests while the Board gathers bids for the corporation stock, and therefore this provision is unenforceable under Delaware common law.

Article II of the BTRta certificate of incorporation lead to the result that plaintiff, CFI, challenges: BTRta was permitted to put aside the interests of the company shareholders in favor of the interests of parties that had no equity interest or financial stake in any of the merger activities. Article II violates Section 102(b)(1) of the Delaware General Corporate Laws, which permits the certificate of incorporation to contain provisions that limit and regulate the powers of the corporation or the directors, but these regulations cannot be contrary to Delaware law. 8 *Del.*

C. §102(b)(1). Article II violates Delaware law as mandated in *Revlon* by giving the board the ability to consider outside interests like “society” and the “community” when deciding between two bids for the company. 506 A.2d 173. By permitting these considerations, Article II attempts to absolve the board of their fiduciary duties of care and loyalty. This attempt is prohibited by Section 102(b)(7) of Delaware Corporate Law.

Delaware law denies corporations the ability to eliminate or limit the liability of directors for breach of their fiduciary duty of loyalty. *Siegman v. Tri-Star Pictures*, 1989 WL 48746, *7-*8 (Del. Ch. 1989). In *Siegman*, the plaintiff brought an action on behalf of a class of shareholders against the defendant Tri-Star Pictures. *Id.* at *1. According to the *Siegman* court, Article Six of the defendant’s articles of incorporation absolved a director’s liability to Tristar or its shareholders for a breach of “any fiduciary duty” arising out of the conduct described in that Article. *Id.* at *8. Limiting liability for a breach of a director’s duty of loyalty is strictly prohibited by Section 102(b)(7) of General Delaware General Corporate Laws. The Chancery Court in *Siegman* found that Article Six violated the doctrine known as “corporate opportunity,” as the Article attempted to allow Tri-Star directors to pursue opportunities that belonged to the corporation. *Id.*; see *Broz v. Cellular Information Systems, Inc.*, 663 A.2d 1180 (Del. 1995).

In the broadest definition provided by Delaware courts, the duty of loyalty has been described as mandating “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). In *Cede*, the this Court further described the duty of loyalty as a way to ensure that there is director independence in a corporate transaction. A “Classic example” of a director breaching this duty is when the director receives some kind of personal benefit from the transaction that is

not received to the shareholders generally. *Id.* at 362. Furthermore, a director can only be considered independent and in line with the duty of loyalty if the director's decision is supported entirely on the benefits to the corporation in the transaction and not overridden or based on any personal considerations. *Id.*

The duty of loyalty is at the heart of the business judgment rule. By demanding independence, the duty of loyalty protects shareholders from "faithless" decisions by the directors. *See Aronson v. Lewis*, 473 A.2d 805, 816 (Del. 1984). An otherwise valid business judgment can be converted into a "faithless act" when directors succumb to influences that are not conducive to independence. *Id.* This duty requires the directors to act with "care" and "attention" towards their actions rather than merely following procedures. *Id.* As described in *Cede*, this kind of breach arises when a director performs a transaction that results in some kind of personal benefit that the rest of the corporation does not share. 634 A.2d at 361.

A director must have the ability to make an objective decision about a potential transaction. *See Ad Hoc Committee of Equity Holders of Tectonic Network, Inc. v. Wolford*, 554 F.Supp.2d 538, 558 (D. Del.2008). In *Revlon*, this Court hinted at a lack of objectivity of this kind on the part of the chairman of the board at Revlon: "All subsequent Pantry Pride offers were rebuffed, perhaps in part based on Mr. Bergerac's (chairman of the board at Revlon) strong personal antipathy to Mr. Perelman (chairman of the board at Pantry Pride)." 506 A.2d at 176.

Revlon can be classified as an expression of the duty of loyalty. In *Revlon*, the defendants Revlon and Fortsmann Little & Co. were enjoined from consummating an option that was granted to Fortsmann to purchase certain Revlon assets. 506 A.2d at 178-79. Pantry Pride had made a series of hostile moves, including cash tender offers, to acquire Revlon throughout 1985. *Id.* at 177-78. Starting at an offer of \$45 per share through a hostile offer, the price offered by

Pantry Pride increased to \$58 per share in October 1985. *Id.* at 179. However, Revlon continued to rebuke the offers from Pantry Price, and took several defensive measures in between these two offers, including a “Notes Purchase Rights Plan” that essentially gave each Revlon shareholder a note with principal of \$65 and 12% interest for each share of common stock the shareholder owned. *Id.* at 177. The redemption right would be triggered when anyone acquired beneficial ownership of 20% or more of Revlon’s shares. *Id.* Revlon eventually adopted a proposal from Fortsmann that included protection for noteholders. *Id.* at 179.

The *Revlon* Court had several problems with the manner in which the board decided to accept the Fortsmann merger proposal over the proposal offered by Pantry Pride. The Court stated that the “Revlon directors could not make the requisite showing of good faith by preferring the noteholders and ignoring its duty of loyalty to the shareholders.” *Id.* at 182. Once it became inevitable that Revlon was going to be broken-up, the duty of the board changed from corporate preservation to maximization of the company’s value for the shareholders’ benefit. *Id.* The directors disregarded this duty by holding the interests of the noteholders above the interests of the Revlon stockholders, as Pantry Pride had pledged to make the highest bid. *See Id.* at 178. This concern for “non-stockholder” interests was found to be “inappropriate.” *Id.* at 182.

Corporations in the bidding process are required to make sure that alternative bids are negotiated and studied by persons whose only loyalty is to the shareholders. *Hanson Trust PLC v. ML SCM Acquisition, Inc.*, 781 F.2d 264, 277 (C.A.2 (N.Y.),1986). In *Hanson Trust PLC*, a case cited by the this Court in *Revlon*, the Second Circuit Court of Appeals held that the SCM Corporation board failed to ensure that alternative bids which were proposed during the course of an asset option purchase agreement pursuant to a merger were scrutinized by persons whose only loyalty was to shareholders. *Id.* Although this case dealt more specifically with the duty of care,

the rule of law that directors in a bidding process owe a duty to shareholders to maximize share price can also be described as part of a directors' duty of loyalty. As held in *Cede*, the duty of loyalty is breached when directors engage in decision making that focuses on interests that are not shared by the stockholders. 634 A.2d at 361. By foreclosing the ability to consider higher bids in an auction process, the defendants in *Hanson*, like the *Revlon* defendants, prevented the shareholders from maximizing share value. As noted by the *Revlon* Court, the two cases were judged on similar grounds. *See Revlon*, 506 A.2d at 183.

In the current case, Article II of the BTRta certificate of incorporation permits the BTRta board to act without regard for the interests of the common stockholders. Article II permits the directors to consider the interests of the "community" over the interests of the shareholders in the case where the company is gathering bids during a "Change of Control Transaction," including a merger. As the Court stated in *Cede*, the best interests of the corporation and the shareholders take precedence over any individual interest held by the directors. Although Sunstein and Sarabhai both have a personal commitment to preserving the environment, this interest is not as important as making sure that shareholders obtain the highest price for their stock when the company is seeking bids or going through a merger. In April 2011, when Sunstein and Sarabhai decided to shed their ownership of BTRta, they had an obligation to ensure that the stockholders obtained the highest return on their investment. *See Revlon*, 506 A.2d at 182. By permitting the board to engage in this kind of reasoning, Article II attempts to circumvent the important protections offered by the duty of loyalty.

Article II also violated Section 102(b)(7) of the Delaware General Corporate Law. This Section denies corporations the ability to limit the liability of directors for violations of the fiduciary duty of loyalty. Article II states that the directors of BTRta are not liable for breaches

of fiduciary duty when these directors make decisions in accordance with Article II. Essentially, Article II attempts to permit the directors to consider outside interests when making corporate decisions and then protect the directors from liability for engaging in this unlawful behavior. Section 102(b)(7) strictly prohibits this result.

By not adopting the proposed CFT merger and relying on Article II of the certificate, the board did not act with the “care” and “attention” mandated by the duty of loyalty and described in *Aronson*. The board was engaged in a “bidding process” similar to the process described in *Revlon*, and therefore the board had an increased duty to ensure that value was maximized to shareholders. The shareholders are not able to share in the benefit that the directors saw in the merger set-up with Defendant, Ravert Ward. Even though CFI offered to keep Sunstein and Sarabhai on as environmental advisors, BTRta was still not satisfied and sought to protect outside interests over ensuring that it made decisions based on the needs of the shareholders. Article II fostered this breach of the duty of loyalty, and therefore its implementation violated Section 102(b)(7).

Article II of the BTRta certificate also breaches the directors’ duty of care. A breach of the duty of care can be used to rebut the business judgment rule. The primary facets of the duty of care are good faith, reasonable belief and reasonable care. The BTRta directors displayed none of these qualities. Article II, much like it did with the duty of loyalty, led the board to breach a fiduciary duty owed to the corporation and shareholders. Furthermore, even if the directors cannot be held financially liable for breaches of the duty of care, Delaware law does not permit the limitation of nonfinancial remedies such as injunctions. *See* Stephen J. Lubben and Alana J. Darnell, *Delawares Duty of Care*, 31 Del. J. Corp. Law 589, 590 (2006).

In *Unocal Corp. v. Mesa Petroleum Co.*, this Court held that a board's effort to interfere with a takeover bid begins with the basic premise that the board has a fiduciary duty to act in the best interests of the shareholders. 493 A.2d 946, 955 (Del. 1985). This "duty of care," according to the Court, is implemented to protect shareholders from any source of harm. *Id.* This duty imposed in *Unocal* has also been described as imposing an "enhanced duty to abjure any action that is motivated by considerations" other than concerns for the corporation and shareholders. *Revlon*, 506 A.2d at 181.

There is a history that supports the use of the duty of care in controlling directors' actions in a transactional setting. This protection has coincided with the Delaware courts' continued expansion of the protection of shareholders against breaches of fiduciary duty by directors. Lubben and Darnell, 31 Del. J. Corp. Law at 601. In *Mills Acquisition Co. v. Macmillan, Inc.*, the Court held that "directors are required to demonstrate both their utmost good faith and the most scrupulous inherent fairness of transactions in which they possess a financial, business or other personal interest which does not devolve upon the corporation or all stockholders generally." 559 A.2d 1261, 1280 (Del. 1988). This "fairness" analysis in a transactional setting included a "fair price" analysis, which requires the directors to obtain the "highest value reasonably available" to the stockholders. *Id.* In *Mills*, the Court found that the directors did not satisfy this fairness inquiry. *Id.* at 1281. The Court held that the directors, who were engaged in an auction (like the auction in the current case), clearly favored one party over others, and that this favoritism resulted in a breach of the fairness inquiry. *Id.*

The Court continues to enforce the concept of an "enhanced duty" on directors engaged in an auction process. In a more recent opinion, the Court ruled that this *Revlon* enhanced duty applied to directors who were engaged in a bidding process for its stock before the business

judgment rule was applied. *See QVC Network, Inc.*, 637 A.2d 34, 45 (Del. 1994). This enhanced duty is also applicable when the board favors one bidder over another bidder in a competitive auction. *See Id. QVC Networks, Inc.* reaffirmed the duty of the board in a *Revlon* situation and also expanded these duties to situations involving other changes of control. *Id.* at 47. In that case, the defensive measures taken by target corporation were enjoined by the Delaware Supreme Court. *Id.* at 37.

The *Revlon* and *Unocal* decisions were the foundations for the enhanced duty analysis. Directors are more closely scrutinized in several situations, and the case law clearly demonstrates that an auction and bid situation calls for closer scrutiny of directors to maximize shareholder value. *See e.g. QVC Networks, Inc.*, 637 A.2d 34. The maximization of shareholder inquiry is applied prior to the application of the business judgment rule. *Id.* at 45. The earlier application of the maximization inquiry demonstrates that this is the highest priority for the board in a sale situation. As the *Revlon* court described, during an auction process, the directors' role shifted from a defender of the corporation to "auctioneers charged with getting the best price for the stockholders at a sale of the company." 506 A.2d at 182.

The directors in the current case also became "auctioneers." It became inevitable that the sale was going to occur, and therefore, prior to applying the business judgment rule, the board had a duty to seek out the highest value for its shareholders. By failing to perform this duty, the directors breached their duty of care to the shareholders.

This conclusion is further supported by the fact that the Delaware courts have continued to expand the protections given to shareholders. This expanded protection, particularly seen in transactional settings, affirms that shareholder protections take precedent over the directors' personal interests or interests that are not shared by the corporation. The directors in this case

made a merger decision based on Article II, which violates Delaware Corporate Law, and failed to obtain the highest possible price for the shareholders. This type of action was explicitly ruled to be unlawful by the *Revlon* Court, and it continues to be the standard applied by this Court. See *QVC Networks, Inc.*, 637 A.2d 34.

By breaching their fiduciary duties, the BTRta board's decision to perform the merger with Ravert Ward should be enjoined. This injunction protects the BTRta shareholders from receiving a lower price for their shares, and CFI, as a bona fide bidder, will be able to present the higher priced offer to BTRta. CFI's offer would give approximately \$38 million more to minority shareholders than the offer presented by Ravert Ward.⁴ This is a significant amount of money, and an amount that cannot be overlooked. The grant of the preliminary injunction best serves the many interests at stake in the current case.

As these cases and arguments demonstrate, CFI is likely to succeed on the merits in this case. Article II of the certificate of incorporation allowed the BTRta board to breach its duty of loyalty to its shareholders, and it also permitted the board, in a transactional setting, to consider interests beyond securing the highest price possible for its shareholders. Article II violates Delaware law, and it is not valid justification for the decision that the board made. Therefore, CFI should be granted the preliminary injunction.

II. Defensive measures were used in *Omnicare* and by BTRta; therefore enhanced judicial scrutiny set out by *Unocal* is required and a lock up does not pass the muster of the enhanced scrutiny.

⁴ The CFI offer is \$1.50 more per share than the best Ravert Ward offer. There are 25,267,042 Class A shares outstanding, making up 49.8% of the voting power. $\$1.50 * 25,267,042 = \$37,900,563$.

Omnicare relied primarily on *Unocal* and *Unitrin* to conclude that the deal protection devices used were subject to enhanced judicial scrutiny. In *Unocal*, the Court adopted the approach that when a board adopts defensive measures in response to a hostile takeover proposal, that the board reasonably determines is a threat to corporate policy and effectiveness, the board's actions are subject to enhanced judicial scrutiny. *Unocal*, 493 A.2d, 954-55 (Del. 1993). Furthermore, the Court has found that a merger transaction that results in a change of control triggers the enhanced judicial scrutiny. *Revlon*, 506 A.2d 173, 182 (Del. 1986). However, a defensive measure alone will not trigger *Revlon*, but all defensive measures are subject to a *Unocal* analysis. In *Unocal*, the Court found that defensive devices must withstand enhanced judicial scrutiny, even when the merger will not result in a change of control. *Unocal*, 493 A.2d at 1151-55.

In *Unocal*, the court developed a two part test to determine if the defensive device is reasonable. *Id.* The first prong puts the burden on the board to show that they have reasonable grounds to believe that a danger to corporate policy and effectiveness existed because of another's stock ownership. The first prong is satisfied by good faith and reasonable investigation. However, the investigation does not end there and a second prong, a test of balance and proportionality must be conducted. The second prong balances the reasonableness of the defensive measure against the threat proposed. *Id.* The proportionality prong was further developed by *Unitrin v. American General Corp.*, 651 A.2d 1361 (Del. 1995). *Unitrin* states that a defensive measure cannot be draconian, and if the defensive measure is found to be not draconian, the response has to be reasonable to the threat imposed. *Id.* The defensive measure is draconian if it is preclusive or coercive. The board's burden on meeting the draconian standard is met if the board can show good faith and reasonable investigation. The board's efforts are

enhanced by having a majority of outside directors or by using an independent committee review the proposal. *Unocal*, 493 A.2d at 955. The level of reasonableness will be determined based on the benefit or detriment to the stockholder interests. *Mills Acquisition Co.*, 559 A.2d 1261, 1288.

Unocal and *Unitrin* have been followed as good law in Delaware as recently as 2011. See *Air Products & Chemicals, Inc. v. Airgas, Inc.*, 16 A. 3d 48 (Del. Ch. 2011). Furthermore, *Unocal* and *Unitrin* have been the standard for conducting the enhanced judicial scrutiny test when defensive measures are implemented for well over 10 years. See *In re Gaylord Container Corp. Shareholder Litigation*, 753 A.2d 462 (Del. Ch. 2000); *Chesapeake Corp. v. Shore*, 771 A.2d 293 (Del. Ch. 2000). Likewise, the *Omnicare* decision relied on these cases to conclude that the deal did not meet the enhanced level of judicial scrutiny.

The facts of this case suggest that the BTRta board did not conduct a good faith investigation; thus not satisfying the first prong of the *Unocal* test. Furthermore, the defensive actions in the BTRta – Ravert Ward merger fail the requirements of the second prong. The reasonableness of the defensive measure was not proportional to the threat imposed by the CFI merger. First, we will discuss the failure of the BTRta Board to conduct a good faith investigation. Second, we will show that the BTRta-Ravert Ward lock up was not reasonably proportional to the proposed merger by CFI.

- a. The BTRta board did not satisfy the first prong of the *Unocal* test as the board did not conduct a good faith investigation, it was not conducted by independent members of the board and no legitimate threat to corporate policy and effectiveness was articulated.

As recently as 2011, the Delaware courts have interpreted the first prong of the *Unocal* test to say that defendant must actually articulate some legitimate threat to corporate policy and

effectiveness. *Air Prod. & Chems.*, 16 A.3d 48, 92 (Del. Ch. 2011). The defendant's conclusions that there is a legitimate threat to corporate policy must be made in good faith and as a result of reasonable investigation. *Unocal*, 492 A.2d at 949 (Del. 1985).

When the investigation is performed by independent board members or an independent committee of the board, the board's conclusions are considered more reasonable and are more likely to be in good faith. See *Unocal*, 491 A.2d at 955 (Del. 1985); *Yucaipa American Alliance Fund II, L.P. v. Riggio*, 1 A.3d 310, 346 (Del. Ch. 2010) (The court took into consideration facts such as whether the majority shareholder was excluded from meetings during merger negotiations, looking beyond the bare notions of an independent board). Following the standards set out by *Unocal* and in accordance with Delaware precedent, an independent committee of board members, was formed by the target corporation in *Omnicare* in order to negotiate a deal. *Omnicare*, 818 A.2d at 922 (Del. 2003).

Factors such as the makeup of the board, the committee who negotiated the merger, and whether a legitimate threat to corporate policy is articulated have been considered by Delaware courts in determining if the board made a good faith and reasonable investigation.

In the current case, the board of directors has articulated no legitimate threat to corporate policy. In *Omnicare*, the company faced the threat of a corporate raider who had been hostile to the target in the past. In the present case, CFI provided assurances that the two majority shareholders of BTRta could serve as consultants to the environmental committee of the CFI board, and would be consulted on any significant alterations of CFI's environmental practices. Any fear that there is a threat to the BTRta corporate ideals of environmental sustainability are unwarranted and illegitimate.

BTRta did not use independent directors in the way that is suggested in *Unocal*, and did not even rise to the standards used in *Omnicare*. In the current case, the two majority shareholders conducted the discussions with Ravert Ward, as they had misgivings about the CFI deal. Nor did an independent committee consider the deal; the two majority shareholder directors completely locked up the deal with their votes.

As an independent committee of board members did not negotiate the Ravert Ward deal and the board was given assurances by CFI that the two majority shareholders would be able to serve as environmental consultants and have a say on environmental policy in the company, BTRta did not perform a reasonable and good faith investigation; thus violating fiduciary duties owed to minority shareholders under *Unocal*.

- b. The mathematical certainty created by the lock up prevented CFI's competing bid, no matter how superior, and therefore was not reasonable in relation to CFI's proposed merger.

In *Omnicare*, the shareholders had no choice on whether the merger took place as the majority locked up the deal. It was mathematically impossible and unrealistically unattainable for the *Omnicare* transaction to succeed, no matter how superior the proposal. A similar situation was presented in *QVC Networks*, 637 A.2d 34. In *QVC*, the court required that minority stockholders be protected when a cohesive group acting together effectively prevents the minority shareholders from influencing corporate direction through the ballot. Furthermore, *Unitrin* concluded that a deal that mathematically locks up the merger is not reasonable, thus not being able to withstand the enhanced judicial scrutiny set forth in *Unocal*.

When a deal is mathematically certain to succeed, no matter how bad the deal compared to alternative bidders, it is unreasonable and not proportional to the threat proposed by the alternative bids.

In the current case, CFI placed a superior bid for BTRta offering a 25% premium over the BTRta closing price and almost a 10% premium over the Ravert Ward offer. Even with these superior terms the two majority shareholders with 50.4% of voting rights completely locked up the deal, pledging to vote their shares in favor of the Ravert Ward deal. Even if a third bidder had come to the table offering a superior price and had a history of conducting environmentally friendly business decisions, the deal would still be locked up in favor of the Ravert Ward deal.

Minority shareholders are required to be protected when a group acts together to prevent the minority from influencing corporate decisions by the ballot box. In this case the minority had no ability to have meaningful vote. A merger is one of the most important decisions that a corporation and its shareholders make and in this case 49.6% of the owners had no say. The minority shareholders effectively had to take whatever inferior deal the two majority owners and directors have pledged their shares for.

The lock up put in place by the BTRta board made the merger a mathematical certainty. No matter what the minority shareholders do with their ballot, they are forced to accept the actions of the board. Therefore, BTRta board's actions are unreasonable and not proportional to the threat proposed by the alternative bids.

Under the *Unocal* test, which has been followed by Delaware courts for over 25 years, the actions of the BTRta board were not performed in good faith and were not reasonable. Furthermore, the BTRta board made the merger a mathematical certainty, which was not proportional to the threat received. *Omnicare* should still be followed. By overruling *Omnicare*,

the Court would be overruling a quarter century of Delaware case law, which has provided protections to investors.

CONCLUSION

The BTRta board of directors have violated fiduciary duties owed to shareholders and any further action by the board will result in irreparable injury to CFI and other shareholders. Article II of BTRta's Articles of Incorporation are invalid under Delaware law as the articles consider environmental factors, which are non-stockholder considerations. Thus, the decision to select the Ravert Ward merger is a breach of fiduciary duties owed to shareholders. Furthermore, the mathematical certainty of the Ravert Ward merger succeeding along with the unreasonableness and lack of good faith demonstrated by the board of directors when they locked up the merger with Ravert Ward violates long standing Delaware case law. There is no justification to overrule *Omnicare*.

The Defendants concede that CFI only needs to demonstrate a reasonable probability of success on the merits at a final hearing in order for the Court to grant a preliminary injunction. CFI has a reasonable probability of success on the merits because Article II of BTRta's certificate of incorporation is unenforceable under Delaware law and *Omnicare* is still good law. Therefore, the lock up created by the BTRta board violates fiduciary duties owed to shareholders.

Respectfully Submitted

Consolidated Forest Industries, Plaintiff -
Below, Appellee

By: /s/ Team P

Team P, Attorneys for Appellee

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