IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE BTRta FOREST PRODUCTS SHAREHOLDERS LITIGATION	, INC.)	NO. 1	42, 2012
BTRta FOREST PRODUCTS, INC. corporation, MATTHEW SUNSTE SARABHAI, MICHAEL F. ALLEN, LIU, KATHLEEN L. TODMAN, HE MCCUSKER, PAULA ABAZIAN, JASTERN, WILLIAM D.HEMPHILL, R WARD L.P., and BTR ACQUISIT	IN, VIKRAM) MILES D.) RBERT) NICE L.) AVERT)		
Defendants Appellants, v.	,	Court	Below: of Chancery of the of Delaware Action No. 6943-CJ
CONSOLIDATED FOREST INDUSTR a Delaware corporation, Plaintiff E Appellee.)		

APPELLEE'S OPENING BRIEF

TEAM R

Attorneys for Plaintiff Below, Appellee

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NATURE OF PROCEEDINGS

Plaintiff below Consolidated Forest Industries Co. ("CFI") sought a preliminary injunction in the Court of Chancery of Delaware against Defendants below BTRta Forest Products, Inc. ("BTRta"), Matthew Sunstein, Vikram Sarabhai, Michael F. Allen, Miles D. Liu, Kathleen L. Herbert McCusker, Paula Abazian, Janice L. Stern, and William Hemphill ("BTRta Directors") to prevent BTRta from carrying out a merger agreement with Ravert Ward L.P. ("Ravert Ward") and BTR Acquisition Corp. (Mem. Op. 2) CFI owns 4,300 shares of Class A common stock in BTRta. (Id.)

In its motion for preliminary injunction, Plaintiff CFI alleged that BTRta had breached its fiduciary duties to shareholders when the board of directors failed to maximize shareholder value by accepting Ravert Ward's inferior cash merger proposal. Moreover, CFI argued that Article II of BTRta's certificate of incorporation violated Delaware precedent articulated by this Court in Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1985) and Omnicare v. NCS Healthcare, Inc., 818 A.2d 914 (Del. 2003).

The Delaware Court of Chancery granted plaintiff CFI's motion for a preliminary injunction and found that BTRta had in fact breached its fiduciary obligations to shareholders. (Id. at 16-17.) The court explained that while corporate directors are able to consider the interests of other constituencies in the scope of their duties, once an active bidding process has commenced, the Revlon duty is triggered and directors' sole fiduciary duty is to maximize shareholder profits by seeking the highest bidder. (Id. at 14.) In reaching its decision,

the Court of Chancery declined to acquiesce to defendants' request to overrule Omnicare.

Accordingly, the Delaware Court of Chancery granted a preliminary injunction in favor of Plaintiff below on January 26, 2012. (Prelim. Inj. Ord.) On January 31, 2012, Chancellor Meghan Jeuel entered an interlocutory order temporarily enjoining defendants' merger with Ravert Ward. (Not. of App. from Interloc. Ord.) Shortly after, on February 2, 2012, defendants filed a timely application for certification of the interlocutory order with the Court of Chancery. (Id.) Plaintiff filed its response to defendants' application for certification of the order on February 3, 2012. This is appellee CFI's opening brief.

SUMMARY OF THE ARGUMENT

- I. This Court should affirm the Chancery Court's grant of preliminary injunction in favor of Plaintiff below/Appellee CFI. This Court should disregard the more deferential standard under the business judgment rule, and it should instead adopt the standard of enhanced judicial scrutiny as it pertains to the duty under Revlon, 509 A.2d at 184. The Chancery Court correctly applied this heightened standard to support a finding that BTRta had in fact breached its fiduciary duties when it approved the inferior cash merger proposal from Ravert Ward. Moreover, this Court should find that certificates of incorporation such as BTRta's Article II cannot absolve corporate directors from liability for breaching the duty of loyalty.
- II. In addition, as a matter of public policy, this Court should not overrule its holding in Omnicare, Inc., 818 A.2d 914 (Del.2003), but rather it should apply the Omnicare precedent to the analogous facts presented in this case. The Omnicare decision provides a valuable legal protection for minority shareholders. The BTRta board of directors breached its fiduciary duties when it accepted the Ravert Ward merger proposal in the absence of a fiduciary out clause, as mandated by this Court in Omnicare. Id. at 918. Moreover, the lock-up option constitutes an impermissibly coercive and preclusive defensive tactic. If this Court overruled its decision in Omnicare, it would greatly undermine the stability and predictability that has come to characterize Delaware corporate law, making this state a desirable choice for incorporation.

STATEMENT OF THE FACTS

This Court is being asked to reverse a Chancery Court of Delaware grant of preliminary injunction in favor of Plaintiff below Consolidated Forest Industries Co. ("CFI"). CFI is a publicly-held Delaware corporation engaged in the production of paper and wood products. (Mem. Op. 3.) CFI owns 4,300 shares of common stock in Defendant below's corporation, Forest Products, Inc ("BTRTA"). at 2.) BTRta is a publicly-held Delaware corporation with its principal place of business in Portland, Maine. (Id. at 4-5.) BTRta has extensive global operations in the United States, Canada, Central and South America, and Southeast Asia. (Id.) The individually-named defendants ("BTRta defendants") are comprised of BTRta's co-founders and co-chief executive officers Matthew Sunstein and Vikram Sarabhai, along with the other independent board of directors who together own 2,154,687 shares of BTRta Class A common stock. (Id. at 4.) Defendant Ravert Ward, L.P. ("Ravert Ward") is a privately-held corporation that is engaged in the business of acquiring smallersized, publicly-held companies. (Id.) BTR Acquisition Corp. is a wholly-owned subsidiary of Ravert Ward, an acquisition company created for purposes of entering into the merger agreement that is at the forefront of this case.

BTRta was founded by Matthew Sunstein and Vikram Sarabhai in 1987. (Id. at 5.) Its stock was first publicly-traded on the Nasdaq Stock Market in 2000. (Id.) BTRta's certificate of incorporation created two classes of common stock, Class A and Class B. (Id.)

Holders of the Class B Stock receive ten votes per share of stock, whereas holders of Class A stock are only entitled to one vote per share of stock. (Id.) Sunstein and Sarabhai, along with their respective families, own all of the BTRta Class B common stock which accounts for approximately 50.4% of the overall voting power as well as 9.2% of the total outstanding shares. (Id. at 5-6.) BTRta's certificate of incorporation includes the following provision in Article II:

Notwithstanding the foregoing, any director is entitled to rely upon the definition of "best interest" 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 the Director's fiduciary duty, even in the context of a Change in Control Transaction where, as a result of weighing other Stakeholders' interest, a Director determines to accept an offer with a lower price per share than a competing offer. (Id. at 6.)

Sunstein and Sarabhai were concerned about BTRta's ability to completely adhere to their core objectives as a publicly-held corporation. (Id. at 7.) Therefore, following a meeting of the BTRta board of directors on April 20, 2011, the board decided to consult a financial advisor to explore the possibility of mergers or acquisitions. (Id. at 8.) After meeting with the financial advisor, Sunstein and Sarabhai explained at a May 18 board meeting that it would be in the best interests of BTRta to sell the entire equity of BTRta, including both the Class A and Class B shares. (Id.) Therefore, the BTRta board of directors resolved to begin soliciting potential bids. (Id.)

In late summer of 2011, CFI expressed an interest in acquiring BTRta. (Id.) In September 2011, CFI presented its

merger proposal to acquire BTRta at a price of \$16.50 per share, an offer which represented a 25% premium over the current market price of Class A BTRta stock. (Mem. Op. at 8-9.) In a meeting held on October 7, CFI's representatives assured the BTRta founders that it would continue BTRta's environmentally fiscal practices and retain Sunstein and Sarabhai as consultants following the merger. (Id.) Moreover, as a sign of its commitment to pursuing the merger, CFI even increased its offer to \$17 per share of BTRta stock. (Id.)

The BTRta board of directors held a meeting on October 7, 2011 to discuss the CFI merger proposal with the board members. (Id.) At the conclusion of this meeting, the board adopted a resolution and approved the CFI merger proposal for \$17 per share. Under the terms of the CFI merger agreement, BTRta was afforded a period of 60 days with which it could seek out "Superior Proposals". (Id. at 10.) In the event that BTRta obtained a Superior Proposal within the 60-day period, BTRta could elect to terminate the CFI merger agreement for a fee of \$15 million. (Id.)

During this termination period, BTRta opted to contact Ravert Ward, a boutique acquisition firm which had previously been involved with the mergers of similar corporations. (Id.) In October 2011, BTRta founders and its financial advisor met with Ravert Ward to discuss a merger agreement. (Id.) Ravert Ward initially proposed a merger deal for \$13 per share of BTRta stock. (Id. at 11.) CFI's 60-day termination period was

scheduled to expire at the end of November 2011 and BTRta had not yet obtained a Superior Proposal. (Id.) During a meeting held in late November, Ravert Ward increased its offer to \$15.50 cash per share for BTRta's stock. Moreover, like CFI, Ravert Ward promised Sunstein and Sarabhai consulting roles within the company and maintenance of existing operational practices. (Id.)

Nevertheless, the revised Ravert Ward merger agreement included several preconditions. First, Sunstein and Sarabhai were required to execute written agreements to vote all of their Class B voting shares in favor of the merger agreement. (Id. at 12.) Second, the BTRTA board of directors was required to hold a stockholder vote on the proposed merger agreement on or before April 1, 2011. (Id.) The third precondition barred BTRTA from soliciting any competitor merger proposals prior to the stockholder vote. (Id.) Fourth, if the merger agreement was terminated, Ravert Ward would be entitled to a \$15 million termination fee. (Id.)

When the BTRta board met on December 13, 2011, it decided that the Ravert Ward merger proposal constituted a "superior proposal" and approved the agreement. (Id.) That same day, BTRta informed CFI representatives of the Ravert Ward merger agreement. (Id. at 13.) On December 16, 2011, CFI commenced an action seeking a preliminary injunction against BTRta to prevent it from going forward with the Ravert Ward merger. (Id.) CFI alleged that BTRta breached its fiduciary duties when, after putting the company up for sale, BTRta failed to maximize shareholder value.

ARGUMENT

I. AN EXCULPATORY PROVISION IN BTRTA'S CERTIFICATE OF INCORPORATION
DOES NOT ABSOLVE THE BOARD'S LIABILITY FOR BREACH OF FIDUCIARY
DUTIES WHEN, AFTER DECIDING TO SELL THE COMPANY, THE BOARD FAILED
TO MAXIMIZE IMMEDIATE SHAREHOLDER VALUE.

A. QUESTION PRESENTED

Under Delaware law, whether an exculpatory provision in the certificate of incorporation absolves directors' liability for breach of fiduciary duties when, after deciding to sell the company, directors fail to maximize immediate value of corporate shares?

B. SCOPE OF REVIEW

This is an appeal from the Delaware Court of Chancery's preliminary injunction order in favor of CFI. This Court will not disturb an order granting a preliminary injunction unless the lower court abused its discretion or based its decision on a misconception or clear error with respect to the facts or the applicable law.

Kaiser Aluminum Corp. v. Matheson, 681 A.2d 392, 394 (Del. 1996). The Delaware Court of Chancery's conclusions of law on directors' fiduciary duties and the validity of an exculpatory provision in the company's certificate of incorporation are reviewed de novo.

C. MERITS OF ARGUMENT

In this case, when the BTRta board decided to sell the entire equity of the company, the board had a sole duty of maximizing shareholder value. BTRta board breached its duty when, faced with two competing offers, it failed to protect financial interests of BTRta's shareholders by reneging on CFI's superior offer and locking BTRta into an inferior cash deal with Ravert Ward.

Even though BTRta's certificate of incorporation contains an exculpatory provision, such a provision does not absolve BTRta directors' liability for breach of fiduciary duties for two main reasons. First, the provision cannot exculpate directors' breach of duties of loyalty and good faith. Here, BTRta board breached those duties when it failed to maximize shareholder value, adopted disabling deal protection devices in the Ravert Ward's merger agreement, and failed to include any fiduciary out mechanisms in the agreement.

Second, Article II of the certificate of incorporation, which authorizes the BTRta board to consider "social, economic, legal or other" interests even in the change of control transaction, enables directors to consciously disregard their responsibilities to the shareholders of the company in the face of a known duty to protect shareholders' interests. Article II violates the core principle of the Delaware law, and, therefore, is invalid.

For the above reasons, this Court should affirm the Court of Chancery's order granting a preliminary injunction in favor CFI.

1. Article II of BTRta's certificate of incorporation cannot exculpate directors' breach of the duty of loyalty and is "contrary to the laws" of Delaware.

The power to manage business and affairs of corporation generally rests with its board of directors. Del. Code Ann. tit. 8, § 141(a) (2011). However, directors' authority is constrained by fiduciary duties of loyalty and care. Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1280 (Del. 1989). Title 8, section 102(b)(7) of the Delaware Code affords some protections to directors by allowing a corporation to include in its certificate of incorporation a provision

that either limits or eliminates the personal liability of directors for breach of the duty of care.

Nevertheless, while section 102(b)(7) permits elimination of the director's liability resulting from a breach of the duty of care, this section, as the Court of Chancery correctly held, "does not implicitly countenance any alteration of the content of the duty of care . . . to permit directors to promote broader societal interests at the expense of the stockholders' interests." (Mem. Op. 16.) Such alteration of the duty of care can implicate the duty of loyalty, especially in the change of control context. Sections 102 and 174 of the Delaware Code make it clear that no corporate charter provision can either eliminate or limit director's liability for breaching the duty of loyalty or for failing to act in good faith. Del. Code Ann. tit. 8, §§ 102(b)(7), 174 (2011); Pfeffer v. Redstone, 965 A.2d 676, 690 (Del. 2009); Siegman v. Tri-Star Pictures, Inc., 15 Del. J. Corp. L. 218, 235 (1989) (unpublished) (denying motion to dismiss where a charter provision was drafted in a manner that could eliminate or limit liability for a breach of the duty of loyalty). Finally, section 102(b)(1) expressly states that directors cannot adopt a corporate charter provision that would violate "the laws of this State." Stroud v. Grace, 606 A.2d 75, 93 (Del. 1992).

In the case at bar, this Court should hold that the BTRta board's conduct was not immunized by Article II of the certificate of incorporation if it finds sufficient evidence to support either of the following: (1) the BTRta board breached its duty of loyalty when it

failed to sell the company to the highest bidder as required by <u>Revlon</u> and its progeny; or (2) Article II, which permits the board to take into account non-stockholder interests "even in the context of a Change in Control Transaction," is "contrary to the laws" of Delaware.

2. This Court should apply the heightened scrutiny test from Revlon to the facts of the case at bar.

Generally, directors have no obligation to maximize the immediate value of the corporation or its shares. See Unocal Corp. v. Mesa

Petroleum Co., 493 A.2d 946, 954 (Del. 1985). The business judgment rule creates a presumption that directors are "faithful to their fiduciary duties" and protects directors' actions that can be "attributed to any rational business purpose." In re Walt Disney Co.

Derivative Litig., 906 A.2d 27, 74 (Del. 2006). Accordingly, where such a presumption applies, courts will give great deference to the substance of the directors' decision. Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971).

However, in certain scenarios, a court will apply enhanced judicial scrutiny and will "take a more direct and active role in overseeing the decisions and actions taken by directors." Paramount
Commc'n Inc. v. QVC Network Inc., 637 A.2d 34, 42 (Del. 1994).

Enhanced judicial scrutiny will be applied to a board's initiation of a bidding process seeking to sell the company, a reorganization involving a clear break-up of the company, or a transaction resulting in a change of control.

Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986); Paramount Commc'n, Inc. v. Time

Inc., 571 A.2d 1140, 1150 (Del. 1989); QVC, 637 A.2d at 42. In these

scenarios, Delaware law mandates that directors seek the highest immediate value for shareholders. <u>In re Toys "R" Us, Inc. S'holder</u> Litig., 877 A.2d 975, 1001 (Del. Ch. 2005).

In the sale of the company context, directors are duty-bound to protect the true owners of the corporation, its shareholders, by maximizing the price of shareholder value. Revlon, 506 A.2d at 182. In Revlon, this Court analyzed an issue concerning directors' duties to shareholders when the sale and "the break-up of the company was inevitable." Id. The Court acknowledged that, generally, a board assumes the role of a "defender[] of the corporate bastion" that may consider interests of various constituencies in discharging its duties. Id. However, this Court emphasized that, when the company is about to be sold, the board's role changes to that of an "auctioneer[] charged with getting the best price for the stockholders." Id.

The duty to secure the transaction offering the best value reasonably available for stockholders is also triggered in the context of a sale of control. QVC, 637 A.2d at 44. The court in QVC reasoned that the QVC transaction that involved a tender offer for fifty-one percent of Paramount's stock followed by a second-step merger, would transfer absolute control of the merged entity to Viacom, Inc. Id. at 42-43. The court explicitly rejected the argument that only the imminent break-up of a corporate entity would trigger heightened scrutiny under Revlon. Id. at 46. The court concluded that heightened scrutiny was appropriate due to "(a) the threatened diminution of the current stockholders' voting power; (b) the fact that a control premium is being sold and may never be available again;

and (c) the traditional concern of Delaware courts for actions which impair or impede stockholder voting rights." Id. at 45.

Furthermore, the <u>Revlon</u> duty may be triggered even without a formal sale when a corporate transaction transfers effective corporate control. <u>Robert M. Bass Group, Inc. v. Evans</u>, 552 A.2d 1227, 1243 (Del. Ch. 1988) (a stock transfer plan that gave the management only thirty-nine percent ownership but still allowed the management to obtain voting control may trigger enhanced scrutiny under Revlon).

In addition, Delaware courts have consistently applied the Revlon duty to secure the highest price reasonably attainable for shareholders in circumstances where a corporation is sold for cash.

Mercier v. Inter-Tel (Delaware), Inc., 929 A.2d 786, 812 (Del. Ch. 2007; In re Topps Co. S'holders Litig., 926 A.2d 58, 64 (Del. Ch. 2007); In re Smurfit-Stone Container Corp. S'holder Litig., 2011 WL 2028076 at *13-16 (Del. Ch. 2011). In each of these cases, the court reiterated that heightened scrutiny in an all-cash transaction is "appropriate because of an 'omnipresent specter' that a board, which may have secured a continuing interest of some kind in the surviving entity, may favor its interests over those of the corporation's stockholders." Unocal, 493 at 954.

Revlon duties are not unique fiduciary obligations. Malpiede v. Townson, 780 A.2d 1075, 1083 (Del. 2001). Revlon neither creates a new type of fiduciary duty in change of control transactions, nor does it modify the nature of directors' fiduciary duties. Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1288 (Del. 1989). "Rather,

Revlon emphasizes that the board must perform its fiduciary duties in the service of a specific objective: maximizing the sale price of the enterprise." Malpiede, 780 A.2d at 1083. The holding of this Court in Revlon has its origins in established trust principles that "once directors decide to sell the corporation, they should do what any fiduciary should do when selling an asset: maximize the sales price for the benefit of those to whom their allegiance is pledged." Toys "R" Us, 877 A.2d at 999.

Moreover, while the court in Time held that the corporation's board of directors, by entering into its initial merger agreement, did not come under a Revlon duty to maximize short-term shareholder value, the holding in Time is inapplicable to the facts of this case for three main reasons. Time, 571 A.2d at 1154. First, as eBay Domestic Holdings, Inc. v. Newmark, 2010 WL 5903398 (Del. Ch. 2010) accurately pointed out, Time "involved the journalistic independence of an iconic American institution," and, therefore, the court's holding was very fact-driven. Second, unlike the decision of the BTRta board to place the company up for sale, Time's board never intended to sell the company. Id. at 1144. Rather, the Time board was focused on consummation of a long-term strategic alliance that had been planned for more than a year. See id. at 1143-47. Third, unlike an all-cash deal between BTRta and Ravert Ward that would squeeze BTRta's shareholders out of the corporate "team" and extinguish their interest, the merger of Time, Inc. with Warner Communications Inc., conducted on a stock-for-stock basis, would preserve Time shareholders' stake in the business venture. See id. at 1145-46.

Here, this Court should apply enhanced scrutiny under Revlon and hold that the BTRta board's sole duty was to maximize current shareholder value. This case falls within the Revlon's mandate because BTRta's board, on its own initiative, placed the company up for sale when it began the process of identifying and soliciting bids for the company. In addition, Revlon duties apply because this type of transaction would transfer "the entire equity of BTRta, both the Class A and the Class B shares" to one entity, Ravert Ward. Finally, both the merger proposal from CFI and Ravert Ward constituted all-cash deals that would automatically trigger the Revlon duties.

3. This Court should hold that Article II of the certificate of incorporation did not absolve directors' liability because they breached their fiduciary duty of loyalty by failing to maximize the value of BTRta's shares, as mandated by Revlon.

This Court should hold that BTRta's directors violated their duties of loyalty and good faith when they failed to maximize shareholder value and included disabling deal protection devices in the merger agreement. Under the Revlon enhanced scrutiny test, courts analyze the adequacy of the board's decision-making and reasonableness of the board's actions based on the totality of circumstances. QVC, 637 A.2d at 45. For example, courts consider the following: the substantiality of termination fees, the disabling nature of any lockups contained in the agreement, and the degree of opportunity afforded for a financially superior offer to emerge after the merger agreement is signed. Dover Diversified, Inc. v. Margaux, Inc., 1994 WL 1751667, at *2 (Del. Ch. 1994). Thus, there is no "single blueprint" that directors must follow in fulfilling their Revlon

obligations. <u>In re Netsmart Techs.</u>, Inc. S'holders Litig., 924 A.2d 171, 197 (Del. Ch. 2007).

Nevertheless, directors fail to fulfill their Revlon duties
"unless they undertake reasonable steps to get the best deal." Id. at
192. Directors' steps are unreasonable when, faced with competing
offers, directors bias the process against one bidder toward another
bidder "more likely to continue current management." In re Topps Co.
S'holders Litig., 926 A.2d 58, 64 (Del. Ch. 2007). Furthermore, "when
multiple bidders are competing for control, fairness forbids directors
from using defensive mechanisms to thwart an auction or to favor one
bidder over another." Barkan v. Amsted Indus., Inc., 567 A.2d 1279,
1286 (Del. 1989) (citing Revlon, 506 A.2d at 182-85). Adoption of
such defensive measures by directors constitutes conscious disregard
of their fiduciary obligations in the face of a known duty and is in
stark contrast to directors' duties of loyalty and good faith.
AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006);
Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 243 (Del. 2009).

In this case, directors breached their <u>Revlon</u> duty to seek the best value reasonably available to the shareholders. While directors did retain a financial advisor and did try to identify potential bidders, ultimately, the BTRta's directors disregarded the interests of shareholders and locked the company into an inferior cash deal.

Ravert Ward's all-cash transaction does not merely transfer effective control; rather, it results in a sale of the entire equity of BTRta.

Consequently, BTRta will cease its existence as a public corporation,

and BTRta's shareholders will be squeezed out of the corporate team. Hence, in this end-game scenario, the board should have protected shareholders' interests by maximizing the price that shareholders could have received for their shares.

The BTRta board failed to advance shareholder interests. The board hastily locked the company into a deal that offered \$15.50 per share, which was considerably less that the CFI's \$17.00 per share offer. In addition, the board failed to act in an informed manner, as indicated by the fact that the Ravert Ward's transaction was consummated in less than two months. Even if this Court finds that the board acted in good faith by trying to take into account environmental concerns, good faith and the subjective intent of the board of directors should not preclude this Court from finding a breach of the duty of loyalty. See AC Acquisitions Corp. v. Anderson, Clayton & Co., 519 A.2d 103, 115 (Del. Ch. 1986) (directors' subjective intent does not limit liability for breach of the duty of loyalty).

Furthermore, BTRta breached its duty of loyalty when the board, at the insistence of Ravert Ward, agreed to adopt disabling deal protection devices in the merger agreement. Those devices included (1) written agreements requiring Sunstein and Sarabhai, who controlled a majority of corporation's voting power, to vote all their shares in favor of merger; (2) a prohibition on the solicitation of competing offers prior to stockholder vote; and (3) a provision mandating shareholder vote even if the board no longer considered the Ravert Ward merger desirable.

In Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 936

(Del. 2003), this Court invalidated nearly identical deal protection devices because they were preclusive and coercive. This Court emphasized that such devices completely prevented the board from discharging its fiduciary responsibilities to the minority stockholders at a time when those shareholders needed legal protection the most. Id. This Court also expressed its concern that such devices "forc[ed] upon stockholders a management-sponsored alternative" and "fundamentally restrict[ed] proxy contests." Id. at 936 (citing Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1388 (Del. 1995).

Similarly, in this case, deal protection devices coerced the consummation of Ravert Ward's merger and effectively precluded any competing superior offer. Furthermore, by adopting such paralyzing deal protection devices in the merger agreement and by failing to include any fiduciary out provisions, the BTRta board disabled itself from the obligation to exercise its fiduciary duties.

Thus, this Court should hold that the board consciously disregarded its responsibilities and breached its duty of loyalty by failing to discharge its obligations in good faith. See Revlon, 506 A.2d at 182 ("when the board entered into an auction-ending lock-up agreement with Forstmann on the basis of impermissible considerations at the expense of the shareholders, the directors breached their primary duty of loyalty"); Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 243 (Del. 2009).

Accordingly, an exculpatory provision in BTRta's certificate of incorporation does not absolve the board's liability for breach of fiduciary duties.

II. THIS COURT SHOULD NOT OVERTURN OMNICARE BECAUSE DOING SO WOULD ERODE THE STABILITY OF THE DELAWARE COURT SYSTEM, UNDERMINE THE POSITION OF MINORITY SHAREHOLDERS, AND VIOLATE THE DOCTRINE OF STARE DECISIS.

A. QUESTION PRESENTED

Whether this court should overturn the 2003 Omnicare decision that protected minority shareholders by invalidating coercive and preclusive deal protection devices?

B. SCOPE OF REVIEW

This case does not present any material facts in dispute and is therefore a question of law. Accordingly, the standard of review is de novo. Spencer v. Goodill, 17 A.3d 552 at554 (Del. 2011).

C. MERITS OF ARGUMENT

In this case, Defendants BTRta and Ravert Ward entered into a merger agreement that contained deal protection devices of the sort that were invalidated by this Court's decision in Omnicare. Instead of attempting to comply with the requirements of the Omnicare decision, BTRta and Ravert Ward seek to overturn this landmark decision. This course of action is ill-advised for a plethora of reasons. First, it would sabotage the preeminent position of the Delaware court system. Second, it would greatly jeopardize the rights of minority shareholders. Third, it would run afoul of the doctrine of stare decisis.

1. This Court should not overturn the holding of Omnicare because doing so would undermine public and corporate confidence in this Court and would have a detrimental effect on the Delaware economy.

Delaware is the epicenter of corporate law in America. Nearly one million businesses have established their legal home in the State of Delaware. Lewis Black, Jr., Why Corporations Choose Delaware (2007), http://corp.delaware.gov/whycorporations web.pdf. These are not all small, closely-held corporations; "[o]f the corporations that make up the Fortune 500, more than one-half are incorporated in Delaware." Id.

As important as Delaware is to corporate law in America, corporations are just as important to Delaware's own financial wellbeing. It is beneficial to the state and corporations alike to cultivate and nurture this symbiotic relationship. For example, in fiscal year 2010, corporations brought in over \$125 million in corporate income taxes to the Delaware budget. The state budget also received \$493 million from abandoned property, as well as \$633 million from Franchise Tax revenue. 1 Jack A. Markell, Governor's Recommended Budget (2011),

http://budget.delaware.gov/fy2012/operating/12opfinsumcharts.pdf. These
three revenue sources contributed over 1.2 billion dollars to the state of
Delaware and accounted for nearly 41% of Delaware's total ordinary
expenditures. Id.

American corporations overwhelmingly flock to Delaware because of the stability and predictability provided by the legislature and the exemplary court system. If this predictability begins to wane, Delaware runs the risk of tarnishing its reputation. Corporations will not want to expose themselves to litigation in a state where the body of corporate law is in an

unusual state of flux. Uncertainty could lead corporations to look for other more favorable and predictable states of incorporation, of which there is an emerging list of potential suitors. <u>E.g.</u>, Mark J. Roe, <u>Delaware's Shrinking Half-Life</u>, 62 STAN. L. REV. 1, 125 (2009) (providing an example of how South Dakota made itself more attractive to top credit-card issuing banks by repealing its interest rate cap).

Instability in the venerable Delaware court system could very well sound the death knell for the state's positioning as the preeminent legal domain for American corporations. If Delaware loses its preeminent reputation, it also stands to lose over 1 billion dollars annually in revenue. This loss could have a crippling domino effect on the state's economy.

Thus, this Court should not overturn the holding of <u>Omnicare</u> because doing so would undermine public and corporate confidence in this Court and would have a detrimental effect on the Delaware economy.

2. Omnicare should not be overruled because it provides necessary protection to CFI and other minority shareholders.

Appellants' contention that this Court desires to overturn the Omnicare decision is in furtherance of their own objectives. However, the decision to overrule Omnicare will have a devastating impact on Delaware's preeminent position in the world of corporate law. By the same token, overruling Omnicare threatens the interests of all the minority shareholders who have come to rely heavily upon the protection that this decision has provided.

In <u>Omnicare</u>, this Court expressed its concern for the rights of minority shareholders and their ability to have a voice in matters of corporate governance. <u>Omnicare</u>, 818 A.2d at 935-38. The Court invalidated disabling deal protection devices and held that the board breached its fiduciary duty of loyalty by failing to include a fiduciary out clause in the merger agreement. Id. at 938.

In addition to the <u>Omnicare</u> decision that sought to protect the rights and interests of minority shareholders, Delaware courts have also mandated that directors refrain from considering non-stockholder interests in change of control transactions. <u>See Revlon</u>, 506 A.2d at 182. In these types of transactions, directors' sole duty is to maximize reasonably attainable shareholder value. <u>Id</u>. The <u>Revlon</u> duty protects minority shareholders, who may often be forced into accepting the majority shareholders' decision regarding a merger agreement.

Upholding the <u>Omnicare</u> decision will ensure a corporate board's compliance with fair procedures for the benefit of minority shareholders. To this end, <u>Omnicare</u> requires all proposed merger agreements to contain a fiduciary out clause. <u>Id.</u> The <u>Omnicare</u> decision recognizes that, without proper legal protection, the already tenuous power of the minority shareholders can be completely usurped by the majority shareholders. Id. at 937.

Overturning this critical decision would inflict substantial and immediate harm upon minority shareholders by depriving them of a vital legal protection. Although they can never be fully shielded because

of the $\underline{\text{de}}$ $\underline{\text{facto}}$ position of weakness and powerlessness, this Court should not set out to undermine their power any further.

3. Under the doctrine of <u>stare</u> <u>decisis</u>, this Court should not overrule the Omnicare decision.

This Court should give paramount consideration to the doctrine of stare decisis. This doctrine, like all similar bedrock doctrines, provides the structural stability upon which confidence in any court is based. Once this Court settles a point of law, 'it forms a precedent which is not afterwards to be departed from or lightly overruled or set aside ... and [it] should be followed except for urgent reasons and upon clear manifestation of error.'" Account v. Hilton Hotels Corp., 780 A.2d 245, 248 (Del. 2001) (citing Oscar George, Inc. v. Potts, 115 A.2d 479, 481 (Del. 1955)). "Stare Stare decisis operates to fix a specific legal result to facts in a pending case based on a judicial precedent directed to identical or similar facts in a previous case." Id.

This Court has articulated the scope of directors' fiduciary duties in previous landmark decisions, and its precedent continues to provide useful guidance to corporate directors. See Unocal, 493 A.2d at 955 (explaining that directors' powers are not absolute); Mills Acquisition, 559 A.2d at 1288 (holding that the asset lockup option granted to the white knight by the target corporation as a part of the merger agreement was invalid and unenforceable). The doctrine of stare decisis requires courts to adhere to previous decisions, such as Omnicare, specifically in factually analogous cases such as the matter before this Court. Id. Appellants even concede that the Ravert Ward merger "bear[s] at least a close resemblance" to the practices that

were invalidated in <u>Omnicare</u>. <u>See Omnicare</u>, 818 A.2d at 936. The very same deal protection devices deemed to be unlawful in <u>Omnicare</u> were implemented by Ravert Ward in this case. The inclusion of such devices in the merger agreement combined with the absence of a fiduciary out clause effectively disabled the BTRta board from discharging its fiduciary duties.

Stare decisis mandates that precedents, like Omnicare, should not be disposed of unless there is an "urgent reason" for disregard or a "clear manifestation of error." Neither of these reasons is present in the case at bar. Therefore, this Court should follow the doctrine of stare decisis and apply the reasoning of Omnicare to hold that the BTRta-Ravert Ward merger was in fact unlawful and that the BTRta board failed to comply with its fiduciary duties.

CONCLUSION

This Court should affirm the decision of the Delaware Chancery

Court and hold that Article II of the BTRta's certificate of

incorporation does not absolve the board's liability for breach of the

fiduciary duty of loyalty. In addition, this Court should not use the

present case as an opportunity to overrule the landmark Omnicare

decision which provides essential protection to minority shareholders.

Accordingly, the Appellee respectfully requests that this Court affirm the decision of the Delaware Chancery Court and grant injunctive relief in favor of CFI.