

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BTRTA FOREST PRODUCTS, INC.,)
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.,) C.A. NO. 69430-CJ
)
Defendant Below-) ON APPEAL FROM
Appellant,) THE COURT OF CHANCERY
) OF THE STATE OF DELAWARE
v.) IN AND FOR NEW CASTLE
) COUNTY
CONSOLIDATED FOREST INDUSTRIES)
CO.,)
)
Plaintiff Below)
Appellee)
)
)
)
)

APPELLEE'S ANSWERING BRIEF ON APPEAL

Filed By:
TEAM U for the Plaintiff Below-Appellee
February 10, 2012

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NATURE OF THE PROCEEDINGS

On December 16, 2011, Plaintiff, Consolidated Forest Industries Co. ("CFI"), brought suit in the Court of Chancery of the State of Delaware against Defendants BTRta, Matthew Sunstein, Vikram Sarabhai, Michael F. Allen, Miles D. Liu, Kathleen L. Todman, Herbert McCusker, Paul Abazian, Janice L. Stern, William D. Hemphill, Ravert Ward L.P., and BTR Acquisition Corp. (collectively "the Defendants"), requesting the merger agreement between BTRta and Ravert Ward be enjoined. On January 26, 2012, CFI moved for entry of a preliminary injunction, which the Court of Chancery entered on January 31, 2012. Then, pursuant to Supreme Court Rule 42, the Defendants applied for an order certifying an appeal from the interlocutory order entering the preliminary injunction on February 2, 2012. The next day, CFI responded to the application and this Court granted the Defendant's application for interlocutory appeal.

SUMMARY OF ARGUMENT

The preliminary injunction entered by the Court of Chancery for the State of Delaware should be upheld because Article II is contrary to the laws of Delaware and as such, the directors were not entitled to rely on it in approving the Ravert Ward Merger. Furthermore, the means by which BTRta approved the Ravert Ward merger are invalid under this Court's holding in Omnicare.

Under Section 102(b)(1) of Delaware General Corporation Law, a corporate charter can include a provision limiting or expanding the powers of the directors so long as it is not contrary to the laws of Delaware. Article II is contrary to the laws of Delaware for two reasons. First, it violates the directors' fiduciary duty of loyalty because it enables the directors to act with less regard for the interests of shareholders than would otherwise be the case in the absence of the provision. Second, it violates the directors' duty of care because it permits the directors to promote broader societal interests at the expense of shareholders' interests. Last, Article II does not exculpate these breaches of loyalty and care. Section 102(b)(7) only permits elimination or limitation of the directors' liability for monetary damages for breach of the fiduciary duty of care. It does not countenance any alteration of the underlying duty of care, nor does it permit any alteration of the duty of loyalty.

Moreover, public policy necessitates that a Supreme Court decision bind future courts to resolve disputes in the same way. Only for "urgent reasons [or] upon clear manifestation of error" can the Court overturn a previous decision. This Court's Omnicare decision

mirrors the instant case. Thus, the courts are bound to order the same result. BTRta appeals not because the Court of Chancery misapplied Omnicare, but because it failed to follow the law of Omnicare and, as a result, wants it to be changed.

BTRta does not argue that there are urgent reasons for overturning Omnicare. In addition, the Omnicare decision is not a clear manifestation of error. First, the Court's application of the Unocal heightened standard is a proper application of Delaware precedent. Second, the Court did not err in finding the merger agreement draconian and a fait accompli. Accordingly, the Court of Chancery Decision should be affirmed.

STATEMENT OF FACTS

This case concerns a dispute between CFI and BTRta over BTRta's decision to merge with Ravert Ward despite CFI's superior merger proposal. (Mem. Op. 13.) Mr. Matthew Sunstein ("Sunstein") and Mr. Vikram Sarabhai ("Sarabhai") formed BTRta in 1987; they serve as board members and co-chief executive officers. (Id. at 5.) Sunstein and Sarabhai developed technology that allows BTRta to manufacture and sell forest products that use sustainably harvested trees, minimizing production impact on the environment. (Id. at 4.)

Prior to its initial public offering in 2000, BTRta included a provision, Article II, in its certificate of incorporation to guide director decision-making. (Id. at 6.) Article II provides:

[I]n determining what is in the best interests of the Company and its shareholders, a Director shall consider the long-term prospects and interests of the Company and its shareholders, and the social, economic, legal, or other effects of any action on the current and retired employees, the suppliers and customers of the Company or its subsidiaries, and the communities and society in which the Company or its subsidiaries operate, (collectively, with the shareholders, the 'Stakeholders').

(Id.) Article II defines these considerations as the company's "best interests" and states that any director acting in that vein will not breach his fiduciary duty. (Id.) Article II also states that in a "Change of Control" transaction, defined as a merger in which BTRta's stock is converted into the right to receive cash, the director cannot breach a fiduciary duty if acting in the company's "best interests."
(Id.)

The prospectus further instructed investors that under Article II, directors would not breach their fiduciary duties if they accept a

lower price per-share merger offer. (Id.) BTRta's prospectus described Article II as a provision that reflects Sunstein and Sarabhai's belief that the company's operation should be conducted ethically and with a view to long-term sustainability, "even if shareholder value is not maximized." (Id. at 7.) BTRta acknowledged the uncertainty of Article II's validity. (Id.)

BTRta consists of two types of common stock, Class A and Class B. (Id. at 5.) Sunstein, Sarabhai, and members of their family own all of the Class B shares, which comprise 50.4% of the voting power in BTRta. (Id.) Class B is entitled to ten votes per share, while Class A is entitled to one vote per share; all other rights are identical. (Id.) Before the merger negotiations, BTRta shares traded between \$13 and \$14. (Id. at 5.)

In 2010, Sunstein and Sarabhai became "disenchanted with their role and responsibilities." (Id. at 7.) On April 20, 2011, the BTRta board of directors retained Eberhard Jefferson L.P. ("Eberhard") to "explore potential transactions, including mergers or acquisitions." (Id. at 8.) Then, Sunstein and Sarabhai presented their desire to sell their equity interests in BTRta and leave the company to the full board. (Id.) On May 18, 2011, the board unanimously voted that Eberhard should identify and elicit bids for the sale of the entire equity of BTRta. (Id.)

By the end of the summer, CFI expressed its interest in acquiring BTRta to Eberhard. (Id.) CFI was interested in complementing its own operations with BTRta's specialty papers and tree harvesting operations. (Id.) In late September 2011, CFI presented a proposal

to acquire BTRta by merger at a price of \$16.50 per share, well above the current trading price. (Id. at 9.)

On October 7, 2011, Sunstein and Sarabhai met with CFI to discuss the proposal further. (Id.) CFI assured Sunstein and Sarabhai that they would serve as consultants to the Environmental Committee of CFI's board of directors after the merger. (Id.) Moreover, they would be consulted on any significant alteration of CFI's environmental practices. (Id.) During this meeting, CFI increased its offer to \$17 per share. (Id.)

Ten days later, the BTRta board met to consider the revised CFI merger agreement. (Id.) Under the terms of the merger agreement, during the 60-day period following the board approval of the agreement, BTRta was allowed to seek out other offers and terminate the agreement in the event of a Superior Proposal. (Id. at 10.) In the event that the merger agreement is terminated, CFI would be entitled to a \$15 million termination fee. (Id.) At the conclusion of the meeting, the board adopted and executed the CFI merger agreement. (Id. at 9.)

In late October 2011, Eberhard, Sunstein, and Sarabhai met with Ravert Ward to discuss the possibility of an acquisition of BTRta. (Id.) Ravert Ward is a boutique acquisition firm with a reputation of acquiring companies focused on corporate social responsibility. (Id.) Ravert Ward expressed interest in a deal, but stated that it could only offer \$13 per share, less than the \$17 per share offered by CFI. (Id. at 11.) The meeting ended with no agreement. (Id.)

At the end of November, as the shop period was coming to a close, Sunstein and Sarabhai asked Eberhard to approach Ravert Ward again. (Id.) Ravert Ward said that a new deal could be reached, but it required BTRta to consummate a deal immediately and include a no-shop clause. (Id.) After a series of meetings in early December, Ravert Ward agreed to offer \$15.50 per share, "considerably less than the CFI merger agreement's \$17 per share price." (Id.) BTRta negotiated with Ravert Ward to manage the operations in accordance with Sunstein and Sarabhai's interests. (Id.) Also, like the CFI agreement, Sunstein and Sarabhai would serve as active consultants implementing the commitment. (Id.)

In order to make these concessions, Ravert Ward insisted that:

1. Sunstein and Sarabhai must execute written agreements to vote all of their shares of Class B Common Stock in favor of the merger;
2. Pursuant to Section 146 of the Delaware General Corporate Law, the board of directors must present the merger agreement to a vote of its shareholders as soon as practicable, and at most by April 1, 2012, even if the board disapproves;
3. BTRta must not solicit any competing merger proposal;
4. If BTRta merges with a company other than Ravert Ward, BTRta must give up \$15 million to Ravert Ward.

(Id. at 12.) On December 13, 2011 the BTRta board concluded that BTRta's environmentally responsible practices would more likely continue and improve under Ravert Ward. (Id.) Despite CFI's

commitment to BTRta's environmental practices and its superior share price offer (\$17 per share as opposed to \$15.50 per share), the BTRta board felt that society as a whole would and the community BTRta served would be better protected by Ravert Ward. (Id.) With that in mind, the board declared Ravert Ward the Superior Proposal and approved the Ravert Ward agreement. (Id.) After the meeting, Sunstein and Sarabhai executed the voting agreements, in accordance with the Ravert Ward agreement. (Id.)

On December 13, 2011, BTRta informed CFI of the Ravert Ward merger agreement. (Id.) The next day, CFI notified BTRta that it objected to the Ravert Ward merger because it was a violation of the BTRta directors' fiduciary duties, and stated it would sue to enjoin the merger. (Id.) On December 16, 2011, CFI filed a preliminary injunction against the consummation of the Ravert Ward merger. (Id.) The Court of Chancery of the State of Delaware entered the preliminary injunction on January 31, 2012. (Id. at 17.) In response, the BTRta Defendants filed a motion for an interlocutory appeal with the trial court on February 2, 2012. (Notice of Appeal 2.) This court granted the application for the interlocutory appeal on February 3, 2012. (Order 1.)

ARGUMENT

- I. ARTICLE II VIOLATES DELAWARE GENERAL CORPORATE LAW SECTION 102(B)(1) BECAUSE IT IS "CONTRARY TO THE LAWS OF (THE) STATE"

A. Question Presented

Whether the BTRta directors violated their fiduciary duties when they relied on Article II to approve the Ravert Ward proposal over CFI's Superior Proposal.

B. Scope of Review

The decision to grant or deny a preliminary injunction requires the trial court to consider whether the plaintiff has established: (1) a reasonable probability of success on the merits; (2) irreparable harm; and (3) a balance of equities in its favor. Allen v. Prime Computer, Inc., 540 A.2d 417, 419 (Del. 1988). Here, because the Defendants conceded that if CFI were to demonstrate the "probability of success" prong, a preliminary injunction would be appropriate, the Court of Chancery granted the preliminary injunction based solely on the validity of Article II. Accordingly, this Court should "consider de novo the meaning" of Article II. Kaiser Aluminum Corp. v. Matheson, 681 A.2d 392, 394 (Del. 1996) (citing Waggoner v. Laster, 581 A.2d 1127, 1132-33 (Del. 1990)).

C. Merits of the Argument

1. The Court of Chancery Correctly Held That the Board's Reliance on Article II Constituted a Breach of Their Fiduciary Duty to the BTRta Shareholders.

In granting the preliminary injunction to CFI, the Court of Chancery was appropriately concerned about protecting the financial interests of the shareholders. (Mem. Op. 14.) With this concern in mind, the Court of Chancery correctly concluded that "the directors of

BTŕta were not entitled to rely on Article II in approving the Ravert Ward merger, and their reliance on societal interests other than the interests of BTŕta's shareholders constituted a breach of their fiduciary duty to those shareholders." (Id. at 16.)

Under the General Corporation Law, a corporate charter may include "any provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation [and] the directors . . . if such provisions are not contrary to the laws of" the state. Del. Code Ann. tit. 8, §102(b)(1) (2012). In conducting the affairs of a corporation, directors have fiduciary duties of loyalty and care to both the corporation and its shareholders. Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 360 (Del. 1993); Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939). The duty of loyalty imposes on directors the obligation to act in the best interest of the corporation and its shareholders. Guth, 5 A.2d at 510. Meanwhile, the duty of care imposes an obligation to act with requisite care in the discharge of their duties. Cede, 634 A.2d at 360. While the Delaware Code permits corporations to include provisions that eliminate or limit the personal monetary liability for breaches of the duty of care in their certificates of incorporation, it implicitly forbids eliminating the underlying duty of care altogether. Del. Code Ann. tit. 8, §102(b)(7) (2012). In addition, it explicitly forbids eliminating or limiting a director's liability for breaches of a director's duty of loyalty. Siegman v. Tri-Star

Pictures, Inc., CIV. A. No. 9477, 1989 WL 48746, at *235 (Del. Ch. May 30, 1989).

For the following reasons, the Court's decision below must be affirmed.

i. Article II Alters the Directors' Fiduciary Duty of Loyalty By Enabling Directors to Act With Less Regard for the Shareholders' Interests

Article II violates the common law duty of loyalty because it permits directors to choose a merger proposal that puts non-shareholders' interests before the shareholders' interests. Under the business judgment rule, directors are allowed to protect the long term interests of both the corporation and the shareholders without the threat of judicial scrutiny. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986). In contrast, when contemplating a merger, directors are required to exclusively act in the shareholder's best return on investment. Id. To ensure that the directors perform their duty, courts analyze the directors' decision making under enhanced scrutiny. Id. This is because there is no "long term" interest of a corporation to protect when the corporation is up for sale. Id.

When a corporation enters "Revlon Mode," that is—when a corporation "undertakes a transaction which will cause: (a) a change in corporate control; or (b) a break-up of the corporate entity,"—a director's sole responsibility is to act as an auctioneer and secure the highest share price reasonably available to the shareholders. Paramount Commc'ns Inc. v. QVC Networks Inc., 637 A.2d 34, 48 (Del. 1993). Once in Revlon Mode, the board "must act in a neutral manner

to encourage the highest possible price for shareholders.” Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286 (Del. 1989). Revlon’s mandate is an extension of the Unocal test which involves two components: “(a) a judicial determination regarding the adequacy of the decision-making process employed by the directors, including the information on which the directors based their decision; and (b) a judicial examination of the reasonableness of the directors’ action in light of the circumstances then existing.” QVC, 637 A.2d at 45.

Directors’ “concern for non-stakeholder interests is inappropriate when an auction among active bidders is in progress.” Revlon, 506 A.2d at 182. In Revlon, while the board claimed it was protecting noteholders by using defensive tactics, this Court ruled that when the break-up of the company became inevitable, noteholders require no further protection. Id. A continued consideration of noteholders at the expense of the shareholders constituted a breach of the directors’ “primary duty of loyalty.” Id.

In contrast, when the sale involves a stock-for-stock transfer, directors may be permitted to consider interests outside of maximizing shareholder value. Paramount Commc’ns, Inc. v. Time Inc., 571 A.2d 1140, 1142 (Del. 1989). Because the Time shareholders would become shareholders in a newly merged company, Time’s board was permitted to protect its corporate culture. Id. This court concluded that directors “are not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy.” Id. at 1154.

However, not all corporate cultures are protectable “as an end in itself.” eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 33 (Del. Ch. 2010). Instead, the protection of a corporate culture “must lead at some point to value for shareholders.” Id. In eBay, the owners of craigslist failed to prove that there was a “palpable, distinctive, and advantageous culture that sufficiently promotes shareholder value.” Id. The Delaware for-profit corporate form “is not an appropriate vehicle for purely philanthropic ends, at least not when there are other shareholders interested in realizing a return on their investment.” Id. at 34. Thus, adopting a plan that specifically seeks not to maximize shareholder wealth fails the first prong of the Unocal test and is not consistent with “directors’ fiduciary duties under Delaware law.” Id. at 35.

Here, BTRta directors were required to secure the highest share price. See Revlon, 506 A.2d at 182. After initial deliberations, BTRta’s board actively pursued bids to sell the entire equity of the company. (Mem. Op. 8.) Unlike a stock-for-stock merger, there was no expectation that BTRta’s shareholders would retain any interest in the acquiring corporation, let alone a controlling interest. (Id.) The fact that BTRta’s board concluded that Ravert Ward would more likely continue BTRta’s environmentally responsible practices was irrelevant to the shareholders pecuniary interests. The board’s only duty was to act in a neutral manner to achieve the highest share price. See Revlon, 506 A.2d at 182. Not only was the highest share price not achieved, indeed, it was even rejected, but the directors favored the interests of non-shareholders over shareholders. (Mem. Op. 12.) This

is impermissible under Revlon and violated the director's duty to remain loyal to the shareholders of BTRta.

Furthermore, Article II runs afoul of the fiduciary duty of loyalty because it actively promotes philanthropic ends over shareholder wealth maximization. See eBay, 16 A.3d at 105. BTRta availed itself of the Delaware for-profit corporate form. (Mem. Op. 7.) Having chosen the for-profit form, the directors of BTRta are required to remain zealously loyal to all investors and, during a sale, are required to seek the highest share price available. See eBay, 16 A.3d at 105-06. The directors' fiduciary duties required shareholder wealth maximization. Any other action is a breach of their fiduciary duty of loyalty.

In conclusion, Article II violates the common law duty of loyalty because it permits directors to favor a merger proposal that puts non-shareholder concerns before the maximization of shareholder value.

ii. *The BTRta Board's Acceptance Of A No-Shop Provision Is A Violation Of Its Duty of Care*

Directors in a change of control action must adhere to the duty of care by protecting the corporation and shareholders from perceived harm, and should their decisions be challenged, "the directors have the burden of proving that they were adequately informed and acted reasonably" to a perceived threat. Unocal Corp. v. Mesa Petrol. Co., 493 A.2d 946, 955 (Del. 1985).

The Ravert Ward no-shop provision violated BTRta's duty of care, because it prohibited BTRta's ability to consider alternative CFI offers that were better for the shareholders. To the extent that a no-shop provision prohibits directors from negotiating or seeking

alternative bids, the provision is invalid and unenforceable as a violation of the board's fiduciary duties. QVC, 637 A.2d at 48 (citing Revlon, 506 A.2d at 184-85). When directors decide to sell control of the corporation, they have "an obligation to continue their search for the best value reasonably available to the shareholders." Id. at 48-49.

In Mills Acquisition Co. v. Macmillan, Inc., the Court articulated a two-part test for analyzing disparate treatment of competing bidders by a board. 559 A.2d 1261, 1288 (Del. 1989). The trial court must first determine whether "[i]n the face of disparate treatment, . . . shareholder interests were enhanced," and, second, determine whether the board's action was "reasonable in relation to the advantage sought to be achieved, or conversely, to the threat which a particular bid allegedly poses to shareholder interests." Id. "The directors have the burden of proving that they were adequately informed and acted reasonably." QVC, 637 A.2d at 45.

Evaluating the Ravert Ward merger under Macmillan's first prong, shareholder interests were not enhanced by BTRta's board. See Macmillan, 559 A.2d at 1288. A no-shop provision cannot "prevent the . . . directors from carrying out their fiduciary duties in considering . . . bids or in negotiating for the best value reasonably available to the shareholders." QVC, 637 A.2d at 49 n. 20 (citing Macmillan, 559 A.2d at 1287). As this Court held in Revlon, a "no-shop provision . . . while not per se illegal, is impermissible under the Unocal standards" when the board must act as an auctioneer and secure the highest share price. 506 A.2d at 184. "[A] no-shop

restriction gives rise to the inference that the board seeks to forestall competing bids." QVC, 637 A.2d at 56 (citing Barkan, 567 A.2d at 1288). In this case, BTRta subjected the two offers to dramatically disparate treatment by instituting a no-shop provision in the Ravert Ward offer, precluding the board from maximizing shareholder interests. The no shop provision interfered with BTRta's duty to its shareholders to gain the highest stock price and is therefore impermissible under Unocal and Revlon.

The no-shop provision was also an unreasonable response to an offer that did not constitute a threat to the corporation. Unocal allows a board to defend against a hostile takeover that threatens corporate policy or control, as long as the defense is reasonable in relation to the threat. 493 A.2d at 955. The CFI offer did not threaten either BTRta's policies or control; therefore, its defensive tactics are unreasonable. First, CFI's offer was not hostile. BTRta put itself up for sale and used an agent to solicit an offer from CFI. Second, BTRta and CFI specifically negotiated provisions into the offer in order to protect BTRta's policies after it would be absorbed into the CFI organization. As this Court held in QVC, a board's commitment to a purchase offer resulting in a "significant disparity of value cannot be justified on the basis of the directors' vision of future strategy, primarily because the change of control would supplant the authority of the current [b]oard to continue to hold and implement their strategic vision in any meaningful way." 637 A.2d at 50.

*iii. Section 102(B)(7) Does Not Exculpate the
Fiduciary Duties Of Loyalty And Care*

Delaware General Corporation Law authorizes the elimination or limitation of the directors' liability for monetary damages for breach of the fiduciary duty of care. Del. Code Ann. tit. 8, § 102(b)(7) (2012). However, this permission is limited to monetary damages and does not prevent equitable relief for the breach of the duty of care. Arnold v. Soc'y for Sav. Bancorp, Inc., 678 A.2d 533, 542 (Del. 1996). In spite of Section 102(b)(7), "the duty of care has continued importance for all directors, regardless of whether their personal wealth is shielded from liability." R. Franklin Balotti and Jesse A. Finkelstein, Balotti and Finkelstein's Delaware Law of Corporations and Business Organizations § 4.15 (3d ed. 2012). In addition, this provision explicitly forbids eliminating or forbidding a director's liability for breaches of a director's duty of loyalty. Siegman, 1989 WL 48746, at *235.

Article II is not a valid exculpation clause. The directors' decision to promote societal interests other than the interests of BTRta's shareholders constituted a breach of their fiduciary duties to those shareholders. While they may be shielded from monetary liability, their duties to act in the best interests of the shareholders still remained when evaluating the merger proposals.

In conclusion, Article II and Section 102(b)(7) do not shield the BTRta directors from breaches of their fiduciary duties.

II. THE DELAWARE SUPREME COURT DECISION IN OMNICARE IS BINDING UPON THIS COURT

A. Question Presented

Whether this Court's decision Omnicare was a clear manifestation of error.

B. Scope of Review

"[W]hen a point has been once settled by decision it forms a precedent which is not afterwards to be departed from or lightly overruled or set aside even though it may seem in later years archaic. This rule is grounded upon public policy and should be followed except for urgent reasons and upon clear manifestation of error." Oscar George, Inc. v. Potts, 115 A.2d 479, 481 (Del. 1955). "The need for stability and continuity in the law and respect for court precedent are the principles upon which the doctrine of stare decisis is founded." Account v. Hilton Hotels Corp., 780 A.2d 245, 248 (Del. 2001).

C. Merits of the Argument

1. There is No "Clear Manifestation of Error" In This Court's Omnicare Decision

The Court of Chancery did not consider whether Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 939 (Del. 2003) applied to the facts of this case, as it had already ordered the injunction. (Mem. Opp. 17.) BTRta has made a few factual distinctions, but the principal contention is that Omnicare should be overturned. (Id. at 16.) BTRta appeals not because the Court of Chancery misapplied Omnicare, but because it failed to follow the law of Omnicare and, as a result, wants it to be changed.

The salient facts of Omnicare mirror the instant case. In Omnicare, as here, the target company's board of directors executed a merger agreement that contained a no shop clause and mandated a majority shareholder's voting agreement. 818 A.2d at 939. This Court held that the "board combined those two otherwise valid actions and caused them to operate in concert as an absolute lock up, in the absence of an effective fiduciary out clause." Id.

There is no clear manifestation of error in this Court's Omnicare reasoning. See Oscar George, Inc., 115 A.2d at 481. First, this Court did not err in applying heightened scrutiny to merger agreements with deal protection measures. Second, the Court properly applied heightened scrutiny to the Omnicare merger agreement. As BTRta has not met its burden of demonstrating a clear manifestation of error, this Court should affirm the decision below.

- i. *The Application Of Unocal to the Deal Protection Devices in Omnicare Is Not a "Clear Manifestation of Error"*

In Omnicare, this Court relied on binding precedent to find that deal protection devices, like defensive measures, are subject to heightened scrutiny. 818 A.2d at 930.

This Court has repeatedly concluded that courts should apply heightened standards to certain corporate actions. See, e.g., Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986). "Because of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders, there is an enhanced duty which calls for judicial examination at the threshold before the protections of the

business judgment rule may be conferred.” Unocal Corp. v. Mesa Petrol. Co., 493 A.2d 946, 954 (Del. 1985).

“Fostering deal certainty offers advantages for both the acquirer and the target.” Eleonora Gerasimchuk, Stretching the Limits of Deal Protection Devices: From Omnicare to Wachovia, 15 Fordham J. Corp. & Fin. L. 685, 687 (2010). Nonetheless, deal protection devices can diminish the power of the shareholders. The Unocal standard applies to ensure that the displacement of shareholder power is reasonable in light of the perceived threat of the shareholders to the board and losing the bid. Paramount Commc’ns, Inc. v. Time Inc., 571 A.2d 1140, 1152 (Del. 1989).

Deal protection conflicts with the shareholders right to oppose a merger that the board of directors blessed. “Avoiding shareholder voting is the goal of most transaction planners most of the time. In the case of public corporations, the process of obtaining shareholder approval is cumbersome and expensive.” Stephen M. Bainbridge, Mergers and Acquisitions 55 (2d ed. 2009). Indeed, in some forms of merger, like the instant case and Omnicare, “shareholders are entitled neither to voting nor appraisal rights.” Id. at 56.

This Court reasoned that “a board of directors’ decision to adopt defensive devices to protect a merger agreement may implicate the shareholders’ right to effectively vote contrary to the initial recommendation of the board in favor of the transaction.” Omnicare, 818 A.2d at 930. In Omnicare, the merger agreement required the majority shareholders to sell their equity to the bidding corporation.

Id. at 926. In so doing, the target board took away the minority shareholder's ability to affect the merger.

Similarly, in the instant case, the Ravert Ward merger agreement forecloses the minority shareholder's ability to accept or reject the merger. (Mem. Op. at 12.) Given the inherent conflict between shareholders and the board over control of the merger, this Court's Omnicare decision properly applied Unocal and its progeny to deal protection devices. See Unocal, 493 A.2d at 954.

ii. This Court Properly Applied Unocal's Enhanced Scrutiny to the Omnicare Merger Agreement.

Applying the Unocal standard in Omnicare, this Court held that the target corporation's "board was required to contract for an effective fiduciary out clause to exercise its continuing fiduciary responsibilities to the minority shareholders. Omnicare, 818 A.2d at 939. The board's failure to meet this requirement violated its fiduciary duties. Id.

The board has the burden to prove two levels of analysis. The first stage requires "reasonable grounds for believing that a danger to corporate policy and effectiveness existed." Time, 571 A.2d at 1152. The directors satisfy this stage when they demonstrate good faith and reasonable investigation. Unocal, 493 A.2d at 955. In Omnicare, the trial court found that the board feared the possibility of losing the offer, which could have caused the corporation to become insolvent without any alternative acquirers. See 818 A.2d at 935.

The second stage requires "that the defensive measure adopted was reasonable in relation to the threat posed." Time, 571 A.2d at 1152. In determining the reasonableness, the courts look first to whether

the measure was coercive or preclusive. Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1387 (Del. 1995). If the measure is not “draconian” (i.e. coercive or preclusive), then the test “requires the focus of enhanced judicial scrutiny to shift to the range of reasonableness.” Id. at 1388 (internal quotations omitted). This Court held that the deal protection devices were both coercive and preclusive, so the range of reasonableness shift was unnecessary. Omnicare, 818 A.2d at 936.

“[T]he determination of whether a particular shareholder vote has been robbed of its effectiveness by impermissible coercion depends on the facts of the case.” Williams v. Geier, 671 A.2d 1368, 1383 (Del. 1996). As the target board approved of the majority shareholders’ voting agreement, the target board forced the shareholders to accept the merger. Omnicare, 818 A.2d at 936. In Omnicare, as well as here, the minority shareholders’ votes were “robbed” of their effectiveness. See id.

The effect of the voting agreement and no-shop clause in Omnicare was also preclusive. Id. Preclusive means that “‘the powers of corporate democracy’ [do not] remain available as a viable alternative” to the shareholders should they disagree with a board decision. Unitrin, 651 A.2d at 1388 n. 39 (citing Unocal, 493 A.2d at 959). In Omnicare, as well as here, the target board forced the board-approved merger agreement upon the shareholders, as the shareholder vote could have no effect. 818 A.2d at 929. Concluding that the deal protection devices were draconian, this Court invalidated the merger agreement. Id.

This Court went on to explain that between precluding the shareholders from having any effect with their vote and the no-shop clause, the board "accomplished a fait accompli." Omnicare, 818 A.2d at 936. A target board violates its fiduciary duties when it requires itself to act in a way that limits the exercise of its fiduciary duties. Paramount Commc'ns Inc. v. QVC Networks Inc., 637 A.2d 34, 51 (Del. 1993). The majority shareholders executed a voting agreement. Omnicare, 818 A.2d at 926. Thus, the "minority shareholders must rely for protection solely on the fiduciary duties owed to them by the directors and the majority shareholder, since the minority shareholders have lost the power to influence corporate direction through the ballot." QVC, 637 A.2d at 43.

By agreeing to a no-shop clause in addition to the voting agreement, the target board was unable to fulfill its Revlon duties. Empirical evidence demonstrates that when a target corporation is permitted to "go-shop" for a period of time after the merger agreement, the corporation will "yield approximately 5% higher returns to target shareholders." Guhan Subramanian, Go-Shops vs. No-Shops in Private Equity Deals: Evidence and Implications, 63 Bus. Law. 729, 730 (2008). Indeed, the ability of the board to look for competing bids maintains competition and fulfills the board's Revlon duties. Id. at 737-38. The addition of the no-shop in the merger agreement made it impossible for the board to negotiate the highest possible bid. See Revlon, 506 A.2d at 182. In conjunction with the voting agreement, the shareholders were stuck, which violated the board's fiduciary duties. Omnicare, 818 A.2d at 926.

In the instant case, as well as in Omnicare, the shareholders were forced to accept the merger and the board relinquished its power. Omnicare, 818 A.2d at 925-26. Consequently, the target boards in both cases created a fait accompli in violation of its fiduciary duties. Id. at 938-39. This Court held that the target "board combined [the no-shop clause and the voting agreement,] two otherwise valid actions[,] and caused them to operate in concert as an absolute lock up, in the absence of an effective fiduciary out clause in the Genesis merger agreement." Omnicare, 818 A.2d at 939.

As the Delaware Supreme Court relied entirely upon its own precedent and came to logical conclusions, the Omnicare decision is far from a "clear manifestation of error." As a result, this Court should affirm the decision below.

CONCLUSION

For the foregoing reasons, the preliminary injunction entered by the Court of Chancery for the State of Delaware should be upheld.