

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. : Court Below: The
: Court of Chancery of
CONSOLIDATED FOREST INDUSTRIES CO., : the State of Delaware,
a Delaware corporation, : C.A. No. 6943-CJ
: Plaintiff Below, Appellee. :

APPELLANTS' OPENING BRIEF

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Dated: February 10, 2012

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NATURE OF PROCEEDINGS

This is an appeal by BTRTA Forest Products, Inc. ("BTRTA"), the nine members of the BTRTA board of directors, and two unrelated acquisition entities—the Defendants-Below/Appellants—from a Memorandum Opinion¹ and Order of the Court of Chancery ruling in favor of the Plaintiff-Below/Appellee Consolidated Forest Industries Co. ("CFI"), and preliminarily enjoining any action to effectuate the merger agreement that the BTRTA directors negotiated with Ravert Ward.

Notwithstanding that the Ravert Ward merger agreement offers the BTRTA stockholders both a premium to market as well as assurances that the environmentally responsible practices that define BTRTA will continue after the merger, CFI complains that the Ravert Ward merger agreement is illegal and in violation of both *Revlon* and *Omnicare*.

The Court of Chancery incorrectly concluded that the Ravert Ward merger agreement violates *Revlon* and *Omnicare*. The Court of Chancery improperly observed that Article II of the BTRTA certificate of incorporation—a provision directing the BTRTA board to weigh the impact of potential merger transactions on the environmentally responsible practices that define BTRTA—is invalid under any possible interpretation of *Revlon*. Moreover, the Court of Chancery gave improperly short shrift to Appellants' argument that the Ravert Ward merger agreement does not violate the rule from *Omnicare*.

This is the opening brief on behalf of Defendants-Below/Appellants.

¹ *Consol. Forest Indus. Co. v. BTRTA Forest Prods., Inc.*, Del. Ch., C.A. No. 6943-CJ, Jeuell, C. (Jan. 26, 2012) (hereinafter Mem. Op.).

SUMMARY OF ARGUMENT

1. Article II of the BTRTA certificate of incorporation was added to the certificate pursuant to the statutory authority of Del. Code Ann. tit. 8, section 102(b)(1) (2010). Article II directs the BTRTA board of directors to consider the environmentally responsible practices that define BTRTA when it makes business decisions. The BTRTA board followed this mandate carefully and faithfully when evaluating whether the CFI merger agreement or the Ravert Ward merger agreement offered the best transactional value for BTRTA stockholders. The Court of Chancery erred in finding that the BTRTA board's compliance with Article II violated *Revlon* simply because it led the BTRTA board to approve the Ravert Ward merger over a merger with CFI.

2. The BTRTA board agreed to include certain deal protection measures in the Ravert Ward merger agreement. The Court of Chancery erred in concluding that those measures fail under *Unocal's* enhanced scrutiny standard, and erred in concluding that the measures violate the rule from *Omnicare*. In fact, the measures meet with approval under enhanced scrutiny review because they are not coercive—they do not rob BTRTA stockholders of the effectiveness of their vote. Additionally, the measures are not preclusive—they do not deprive BTRTA stockholders of the right to receive and act upon other offers to purchase their shares. Moreover, the measures fall within a range of reasonableness because the BTRTA board agreed to the measures after exercising good faith and conducting a reasonable investigation. Finally, the rule from *Omnicare* does not apply because the measures do not cause the Ravert Ward merger to be a *fait accompli*.

STATEMENT OF FACTS

I. THE PARTIES

CFI, a Delaware corporation headquartered in Idaho, is one of the world's largest producers of paper and wood products. (Mem. Op. 3.)

BTRTA is also a Delaware corporation and has its principal place of business in Portland, Maine. (Mem. Op. 4.) Moreover, BTRTA has operations throughout the eastern United States and the world. (Mem. Op. 4.) BTRTA produces specialty papers and chemicals derived from trees, as well as sustainably harvested lumber. (Mem. Op. 4.)

Ravert Ward is a limited partnership headquartered in Haverhill, Massachusetts. (Mem. Op. 4.) Ravert Ward specializes in arranging private acquisitions of smaller public companies, including companies focused on corporate social responsibility. (Mem. Op. 4, 10.)

II. BTRTA'S HISTORY

BTRTA—founded in 1987 by Matthew Sunstein and Vikram Sarabhai—has two classes of common stock. (Mem. Op. 5.) Messers Sunstein and Sarabhai own all the Class B shares, controlling 50.4% of the stockholder voting power. (Mem. Op. 5.) The other class of shares—Class A shares—are publicly held and trade on NASDAQ. Of the nine members comprising the BTRTA board of directors, seven directors are independent. (Mem. Op. 4.) BTRTA's seven independent directors own, in aggregate, 2,154,687 shares of BTRTA Class A Common Stock. (Mem. Op. 4.) Both classes of stock carry one vote per share and vote together on all matters requiring a stockholder vote. (Mem. Op. 5.)

BTRTA's certificate of incorporation includes a provision ("Article II") that publicly instructs the BTRTA directors to, at all

times, consider the impact of any and all business decisions on the environmentally responsible practices that define BTRTA. (Mem. Op. 6.) Article II's scope expressly includes change in control transactions. (Mem. Op. 6.)

When the Class A shares were first issued, the prospectus for the initial public offering publicly disclosed the existence and impact of Article II as a "Risk Factor," specifying that BTRTA's vision of stockholder value maximization included the continuity of the environmentally responsible practices that define the company. (Mem. Op. 7.) The prospectus clearly and publicly states that BTRTA will defend Article II, if challenged. (Mem. Op. 7.)

III. THE DISPUTE

On May 18, 2011, the BTRTA board hired financial advisor Eberhard Jefferson L.P. ("Eberhard") to explore potential merger or sale transactions. (Mem. Op. 8.) One suitor—CFI—emerged late in the summer of 2011 with an offer to purchase all BTRTA common stock for \$16.50 per share. (Mem. Op. 8-9.) While the BTRTA board was evaluating CFI's offer, serious questions emerged as to whether CFI could credibly commit to continuing the environmental practices that define BTRTA. (Mem. Op. 10.) After CFI increased its offer to \$17 per share and gave the BTRTA board sixty days to find a superior deal, however, the BTRTA board publicly agreed to the deal on October 17, 2011. (Mem. Op. 10.)

The BTRTA board had no intention of sitting on its hands during this sixty day period, particularly in light of the board's concerns with the CFI deal. (Mem. Op. 10.) Accordingly, the board instructed

Eberhard to continue to canvass the market for suitors, specifically suitors that would offer a superior deal value through a combination of price and environmentally responsible practices. (Mem. Op. 10.)

Ravert Ward emerged as the suitor of choice, initially offering \$13 per share for all BTRTA shares, but then revising its offer to \$15.50 per share—a premium over the market price for BTRTA shares. (Mem. Op. 10-11.) Ravert Ward is a leading proponent of corporate social responsibility. (Mem. Op. 10.) In order to assure the BTRTA board that a deal with Ravert Ward will preserve the environmental practices that define BTRTA, the Ravert Ward deal provides that Messers Sunstein and Sarabhai will consult with Ravert Ward on those practices after the deal closes. (Mem. Op. 11.)

Ravert Ward also insisted on the following deal protection measures: (i) Messers Sunstein and Sarabhai will execute written agreements to vote their Class B shares in favor of the merger, (ii) a stockholder vote will take place on or before April 1, 2012, (iii) BTRTA will not actively solicit further offers, and (iv) a \$15 million termination fee will be paid to Ravert Ward if the deal collapses. (Mem. Op. 12.) The BTRTA board approved the Ravert Ward merger agreement and Messers Sunstein and Sarabhai executed the voting agreements on December 13, 2011. (Mem. Op. 12-13.) The BTRTA board informed CFI of the Ravert Ward merger the same day. (Mem. Op. 13.) CFI responded with this suit to enjoin the merger.

ARGUMENT

I. ARTICLE II OF BTRTA'S CERTIFICATE OF INCORPORATION IS AUTHORIZED BY SECTION 102(b)(1) OF THE DELAWARE GENERAL CORPORATION STATUTES AND IS NOT CONTRARY TO REVLO

A. Question Presented

Did the Court of Chancery correctly conclude that Article II of BTRTA's certificate of incorporation is invalid because it caused the BTRTA directors to violate the requirements of Revlon and, as such, is contrary to the laws of Delaware?

B. Standard of Review

Although the grant or denial of a preliminary injunction is generally reviewed for abuse of discretion, this Court reviews such a grant or denial without deference to embedded legal conclusions of the Court of Chancery. *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 394 (Del. 1996) (citing *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361 (Del. 1995)). "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." *Id.* (citing *Allen v. Prime Computer*, 540 A.2d 417, 419 (Del. 1988)).

C. Article II Is Authorized by Section 102(b)(1) of the Delaware General Corporation Statutes

Delaware statutorily provides that a Delaware corporation may have provisions in its certificate of incorporation which "create, defin[e], limit[], [or] regulat[e] the powers of the corporation, [or] the directors" Del. Code Ann. tit. 8, § 102(b)(1) (2010). Any such provision is valid as long as it is not contrary to the laws of Delaware. *Id.*

Messers Sunstein and Sarabhai incorporated BTRTA in Delaware because they recognized that "Delaware corporations have broad authority to adopt charter provisions"—provisions that effectively implement the BTRTA vision of using environmentally responsible practices. *Stroud v. Grace*, 606 A.2d 75, 93 (Del. 1992).

Accordingly, Messers Sunstein and Sarabhai and the rest of the BTRTA board inserted Article II into BTRTA's certificate of incorporation to ensure that the corporation's environmentally responsible vision would be expressly preserved in the decision-making processes of the BTRTA board. In fact, Article II directs the BTRTA board to evaluate a "Change of Control Transaction" by considering both the price offered as well as the transaction's potential impact on the continuity of BTRTA's environmentally responsible practices.

Article II clearly falls within the ambit of section 102(b)(1) because it defines the power of the board of directors. Moreover, as explained in the following section, Article II is valid because it does not otherwise violate Delaware law—*Revlon*, in particular.

D. *Revlon* Does Not Prevent the BTRTA Directors from Considering the Continuity of BTRTA's Environmentally Responsible Practices when Evaluating Whether CFI or Ravert Ward Offered the Best Transactional Value

A foundational premise of Delaware law—codified in Del. Code Ann. tit. 8, section 141(a) (2010)—is that the business and affairs of a Delaware corporation are managed by and under the control of the board of directors. The business judgment standard of review applied by Delaware courts logically extends from this foundational premise by presuming "that in making a business decision the directors of a

[Delaware] corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). Accordingly, when applying business judgment review, Delaware courts will not substitute their own judgment for that of a board of directors of a Delaware corporation as long as the board's judgment can be attributed to any rational business purpose. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985).

Not all actions or decisions made or taken by the board of directors of a Delaware corporation receive deferential business judgment review, however. For example, the potential for entrenchment and self-dealing lurking in certain corporate transactions have led Delaware courts to review such transactions under a heightened standard of review called "enhanced scrutiny." *Id.* at 954. The two key features of enhanced scrutiny are:

- (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.

Paramount Commc'ns Inc. v. QVC Network, Inc., 637 A.2d 34, 45 (Del. 1993).

In the context of change of control transactions—namely those transactions in which the stockholders of a corporation being sold give up control of the corporation in exchange for cash or stock in the acquiring corporation—this Court determined that Delaware courts review the actions and decisions of the board under enhanced scrutiny by determining whether those actions and decisions resulted in "the

maximization of the company's value at a sale for the stockholders' benefit." *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986).

The rule from *Revlon* is colloquially spoken of as a requirement that the board of directors of a Delaware corporation maximize stockholder value by selling to the highest bidder when the corporation enters the *Revlon* "mode." Yet there is room within *Revlon's* mandate for Delaware directors to consider other interests *shared by* the corporation and its stockholders. The duties that this Court placed upon Delaware directors in *Revlon* were founded in concerns about directors' fiduciary duties. It is within the reasons for those concerns that room exists within *Revlon* for Delaware directors to consider price maximization alongside other interests *shared by* the corporation and its stockholders.

In this case, BTRTA entered the *Revlon* mode when the BTRTA board began to contemplate a change of control transaction with CFI. While in the *Revlon* mode, the BTRTA board decided to sell the corporation to Ravert Ward for \$15.50 per share, despite CFI's offer of \$17 per share. Notwithstanding the BTRTA board's consideration of Article II—a valid section 102(b)(1) provision directing the board to consider BTRTA's environmentally responsible practices when evaluating a change of control transaction—the Court of Chancery held that the board's decision to enter into the Ravert Ward merger agreement was contrary to *Revlon's* mandate, at least as that mandate is colloquially explained. Nevertheless, in light of this Court's concerns underlying its decision in *Revlon*, as well as the meteoric rise in the importance

of corporate social and environmental responsibility, there is room within *Revlon* to permit Delaware directors to consider price maximization alongside other interests *shared by* the corporation and its stockholders.

1. BTRTA's Board of Directors Satisfied the Rationale Underlying *Revlon's* Enhanced Scrutiny

"The central purpose of *Revlon* is to ensure the fidelity of fiduciaries." *In re Toys "R" Us, Inc. S'holder Litigation*, 877 A.2d 975, 1021 (Del. Ch. 2005). "It is not a license for the judiciary to set arbitrary limits on the contract terms that fiduciaries acting *loyally and carefully* can shape in the pursuit of their stockholders' interests." *Id.* (emphasis added). Specifically, "*Revlon* requires that there be the most scrupulous adherence to ordinary principles of fairness in the sense that stockholder interests are enhanced, rather than diminished, in the conduct of an auction for the sale of corporate control." *Mills Acquisition Co.v. Macmillan, Inc.*, 559 A.2d 1261, 1285 (Del. 1989). In other words, Delaware directors satisfy *Revlon* by *loyally and carefully* pursuing the interests of the stockholders—all their interests as stockholders—in a change of control transaction.

a. Duty of Care

Delaware directors are subject to two primary fiduciary duties—the duty of care and the duty of loyalty. A director breaches the duty of care owed to the corporation and its stockholders when that director makes a business decision that is grossly negligent with respect to the corporation or its stockholders. *See Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985) (quoting *Aronson*, 473 A.2d at

812). Notwithstanding the existence of this duty, Delaware statutorily permits a Delaware certificate of incorporation to include provisions that limit the personal monetary liability of directors for breaches of the duty of care. Del. Code Ann. tit. 8, § 102(b)(7) (2010). Simply put, Delaware statutorily recognizes the right of the certificate of incorporation to add context to the duty of care. In this case, Article II of BTRTA's certificate of incorporation adds context to the BTRTA directors' duty of care—it instructs the BTRTA directors to consider the corporation's environmentally responsible practices when evaluating a change of control transaction. The BTRTA directors took their Article II obligation seriously and, after months of careful deliberation and negotiation, determined that the continuity of these practices fared substantially better under the Ravert Ward merger agreement than under a merger with CFI. The directors made this informed decision in good faith, choosing to carefully balance the *shared* corporate and stockholder interest in the continuity of these practices with providing BTRTA stockholders a premium to market for their shares. The BTRTA board's actions were not grossly negligent; rather, the board acted carefully and in good faith.

b. Duty of Loyalty

A Delaware director breaches the duty of loyalty owed to the corporation and its stockholders when that director engages in fraud, bad faith, or self-dealing toward the corporation or its stockholders. *Van Gorkum*, 488 A.2d at 873. It is undisputed that self-dealing is absent in this case. Moreover, CFI has not alleged any fraudulent

conduct. In fact, the BTRTA directors loyally and faithfully acted upon their Article II mandate. This action is not fraudulent, in bad faith, or self dealing.

This Court's primary concern in *Revlon* was ensuring that Delaware directors faithfully render their fiduciary duties. In this case, BTRTA's directors did exactly that, acting with utmost care and loyalty in choosing Ravert Ward over CFI. Accordingly, even under enhanced scrutiny review, the BTRTA board's decision-making was adequate, reasonable, careful, and loyal. Because *Revlon's* essential purpose has been satisfied by the actions and decisions of BTRTA's board in this case, Article II is valid and is not contrary to *Revlon*.

2. *Revlon* Leaves Room to Consider Stockholder Profit Maximization Alongside Other Interests Shared by the Corporation and its Stockholders

The Honorable Chancellor Leo E. Strine, Jr. suggests that the Delaware corporation should not be viewed so narrowly as existing only to maximize the dollar-value wealth of its current stockholders. Leo E Strine, Jr., *The Social Responsibility of Boards of Directors and Stockholders in Change of Control Transactions: Is there any "There" There?*, 75 S. Cal. L. Rev. 1169 (2002). Chancellor Strine suggests that it may be entirely appropriate for a board of directors to "tak[e] into account the interests of other contributors to corporate success, such as its employees, the communities in which its facilities operate, and the nation in which it is chartered." *Id.*, at 1170. Many states have responded to these and similarly pervasive ideas by adopting "stakeholder statutes"—statutes that expressly permit corporate directors to consider stakeholder groups such as

employees, suppliers, customers, creditors, and communities, when making business decisions. See Kathleen Hale, Note, *Corporate Law and Stakeholders: Moving Beyond Stakeholder Statutes*, 45 Ariz. L. Rev. 823, 833 (2003).

In this case, the prospectus for the initial public offering of BTRTA A shares publicly highlighted Article II, the importance that it places on the continuity of BTRTA's environmentally responsible practices, and the potential consequences for those who purchased shares. In light of that public disclosure, investors purchased Class A shares and became BTRTA stockholders. As Chancellor Strine posits, some stockholders value stocks that emphasize social and environmental responsibility because those stockholders believe that a corporation's purpose is more complex than simply maximizing stockholder profit.² Accordingly, where a Delaware corporation clearly and publicly discloses the content and potential consequences of its environmentally responsible practices, and stockholders purchase in light of such disclosures, *Revlon* should not be construed so narrowly as to hang stockholder interests solely on the peg of stockholder profit maximization. Such a narrow construction of *Revlon* is the corporate law equivalent of forcing a square peg into a round hole

² Public interest in corporate social responsibility has seen tremendous growth. See Social Funds, www.socialfunds.com (last visited Feb. 10, 2012); *Socially Responsible Mutual Funds*, Investorpedia (Sept. 18, 2009), <http://www.investopedia.com/articles/mutualfund/03/030503.asp#axzz1ljxam9o2>. BTRTA's business success has been built on the basis of its responsible practices. There is room in *Revlon's* concept of "value" to recognize that a corporation and its stockholders may value these interests. See Manuel Castelo Branco & Lucia Lima Rodrigues, *Positioning Stakeholder Theory within the Debate on Corporate Social Responsibility*, 12 Electronic J. Bus. Ethics & Org. Stud. 1 (2007).

because it assumes that stockholder interests are square when they are, in fact, round. In light of the disclosure of the content and potential impact of Article II in the A shares' prospectus, the BTRTA directors' decision to enter into the Ravert Ward merger agreement does not violate *Revlon*.

II. THE BRIGHT-LINE RULE FROM *OMNICARE* DOES NOT APPLY TO INVALIDATE THE RAVERT WARD DEAL PROTECTION MEASURES

A. Question Presented

Did the Court of Chancery correctly conclude that the Ravert Ward deal protection measures are invalid under the bright-line rule from *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914 (Del. 2003)?

B. Standard of Review

The Court of Chancery, when applying *Omnicare* below, summarily dismissed Appellants' *Omnicare* argument, characterizing it as principally contending that *Omnicare* should be overruled. The Court of Chancery's brief overture to *Omnicare* was rife with legal conclusions and totally unsupported by facts. Accordingly, this Court reviews Appellants' *Omnicare* argument without deference to the Court of Chancery. See *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 394 (Del. 1996) (citing *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361 (Del. 1995)).

C. Enhanced Scrutiny versus Business Judgment Review of the Ravert Ward Deal Protection Measures

The power and authority to manage the business and affairs of a Delaware corporation is statutorily vested in the board of directors. Del. Code Ann. tit. 8, § 141(a) (2010). This oft-repeated principle leads logically to the presumption generally applied in the judicial

review of decisions made by boards of Delaware corporations—namely, the presumption that “in making a business decision the directors of a [Delaware] corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.” *MM Cos. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1127 (Del. 2003). A plaintiff challenging Delaware directors’ decisions bears the burden of rebutting this judicial presumption of deference to the directors’ business judgment. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). Where a plaintiff is unable to rebut this presumption, “a court will not substitute its judgment for that of the board if the [board’s] decision can be ‘attributed to any rational business purpose.’” *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985) (quoting *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971)).

Circumstances—very limited circumstances—exist, however, where Delaware courts initially set aside this business judgment review and evaluate a board’s decisions under the less deferential “enhanced judicial scrutiny before the presumptive protection of the business judgment rule can be invoked.” *Omnicare*, 818 A.2d at 938.

In *Omnicare*, this Court held that a board’s “decision to adopt defensive devices to *completely* ‘lock up’ [a] merger mandated ‘special scrutiny’ [also known as enhanced scrutiny] under the two-part test set forth in *Unocal*.” *Id.* at 934 (emphasis in original). This statement makes clear that only *complete* lock-ups are reviewed under enhanced scrutiny and that *incomplete* lock-ups—like the Ravert Ward deal protection measures in this case—fall outside of enhanced

scrutiny, and are subject to deferential business judgment review.³ Notwithstanding the clarity of this rule, Appellant assumes arguendo that enhanced judicial scrutiny applies in this case because the Ravert Ward deal protection measures do not lock up the agreement and, accordingly, they pass muster under either standard of review.

In order to survive enhanced scrutiny, a board is required to demonstrate that its actions meet both prongs of a two-prong test. First, the board must show "that [it] had reasonable grounds for believing that a danger to corporate policy and effectiveness existed" *Id.* at 935 (quoting *Unocal*, 493 A.2d at 955). In this case, the BTRTA board must show that when it responded to the threat of losing the Ravert Ward deal and of being left with no merger partner sharing BTRTA's and BTRTA stockholders' interest in environmentally responsible practices, that the BTRTA board acted in good faith by agreeing to the Ravert Ward deal protection measures after conducting a reasonable investigation. *Id.* Second, the board must show that the deal protection measures employed are "reasonable in relation to the threat posed." *Id.* In this case, the BTRTA board must show that the Ravert Ward deal protection measures are neither "coercive" nor "preclusive," and that they fall within a "'range of reasonable

³ Chief Justice Veasey, in his joint dissent with Justice Steele in *Omnicare*, stated that even in that case, where the deal protection measures completely locked up the agreement, that it was "debatable whether *Unocal* applies—and we believe that the better rule in this situation is that the business judgment rule should apply." *Omnicare*, 818 A.2d at 943 (Veasey, J. dissenting). Chief Justice Veasey concludes, however, that with respect to the facts of *Omnicare*, "one deferring or one applying *Unocal* scrutiny would reach the same conclusion"—the conclusion that the deal protection measures in *Omnicare* were permissible under Delaware law. *Id.* at 949.

responses' to the threat perceived." *Id.* at 935 (citing *Unitrin*, 651 A.2d at 1387-88). If the BTRTA board's actions withstand enhanced judicial scrutiny under *Omnicare*—namely, *Unocal*'s reasonableness and proportionality analysis—this Court must apply deferential business judgment review and bless the BTRTA board's decision to agree to the Ravert Ward deal protection measures. See *Unitrin*, 651 A.2d at 1374.

1. Coercion

A board of directors' response is "coercive" if it impermissibly robs a particular stockholder vote of its effectiveness. "[T]he determination of whether a particular stockholder vote has been robbed of its effectiveness by impermissible coercion depends on the facts of the case." *Omnicare*, 818 A.2d at 935 (quoting *Brazen v. Bell Atl. Corp.*, 695 A.2d 43, 50 (Del. 1997)). Where a "stockholder vote would have been robbed of its effectiveness" by deal protection measures "that predetermined the outcome of the merger without regard to the merits" of the transaction "at the time the [stockholder] vote [is] scheduled to be taken," then those deal protection measures are coercive and impermissible. *Id.* at 936 (quoting *Brazen*, 695 A.2d at 50).

In this case, the Ravert Ward deal protection measures do not predetermine the outcome of the stockholder vote because the two majority stockholders have the power and right to sell their shares before the stockholder vote⁴ and because Ravert Ward does not possess

⁴ Messers Sunstein and Sarabhai are, with respect to BTRTA, both "control persons" under the federal securities laws and Securities and Exchange Commission rules. As such, they face certain restrictions to selling their BTRTA shares. The two men would, practically speaking,

an irrevocable proxy to vote those shares. This is critically different from the facts of *Omnicare*. The voting agreements in this case are different from those in *Omnicare* because the agreements in this case allow for an effective fiduciary out—namely, that the two majority stockholders are permitted and able to divest their shares to another who could freely vote those shares for whichever deal that new stockholder prefers.

2. Preclusion

"A response is 'preclusive' if it deprives stockholders of the right to receive all tender offers or precludes a bidder from seeking control by fundamentally restricting proxy contests or otherwise." *Id.* at 935 (quoting *Unitrin*, 651 A.2d at 1387).

In this case, the Ravert Ward deal protection measures—particularly the voting agreements—do not preclude a bidder from launching a potentially successful tender offer for control of BTRTA. This is true because the voting agreements do not restrict any BTRTA stockholders from selling their shares—nor do the agreements vest in Ravert Ward an irrevocable proxy the shares subject to the agreements.

nevertheless be able to sell their B shares in one of several ways. First, the men could sell their BTRTA shares in a secondary market private placement to a "qualified institutional buyer" pursuant to Rule 144A of the Securities Act of 1933. Second, the men could, pursuant to Rule 144 of the Securities Act of 1933, sell a sufficient number of their BTRTA shares to relinquish majority voting control before the stockholder vote. Moreover, the two men could tender their BTRTA shares without restriction in a tender offer because, in that case, the two men would not meet the definition of an "underwriter" in section 2(a)(11) of the Securities Act of 1933. Accordingly, there are no legal or practical barriers restricting Messers Sunstein and Sarabhai from transferring their BTRTA shares prior to the stockholder vote.

This is critically different from the facts of *Omnicare*. Because of this difference, the Ravert Ward merger agreement is not a *fait accompli*, unlike the Genesis merger agreement in *Omnicare*.

Accordingly, the Ravert Ward merger agreement is not preclusive of a bidder launching a successful tender offer for control of BTRTA.

3. The *Omnicare* Court's Alternative Argument

The court in *Omnicare* launched into an alternative argument, finding that even if the deal protection measures in that case were neither preclusive nor coercive, that they would nonetheless fail. The court based this argument exclusively on the "the specifically enforceable irrevocable voting agreements" present in the facts of that case. *Omnicare*, 818 A.2d at 936. The *Omnicare* court clarified the extraordinarily narrow parameters of this alternative argument by stating:

Under the circumstances presented in this case, where a cohesive group of stockholders with majority voting power was irrevocably committed to the merger transaction [t]he NCS board [abdicated] its fiduciary duties to the minority by leaving it to the stockholders alone to approve or disapprove the merger agreement because two stockholders had already combined to establish a majority of the voting power that made the outcome of the stockholder vote a foregone conclusion.

Id. at 937 (emphasis added).

In *Omnicare*, the court was punishing the NCS board for not having installed a device in the Genesis merger agreement "protecting the minority stockholders" so that the stockholder vote was not "likely to become a mere formality." *Id.* at 937. More specifically, the device that the court wanted to see in the merger agreement was an "effective fiduciary out clause." *Id.* at 938-39. The court's reasoning here was

clearly and narrowly holding that because the majority stockholder vote lock-up "became an integral part" of the Genesis agreement, "[t]he NCS board was required to contract for an effective fiduciary out clause to exercise its continuing fiduciary responsibilities to the minority stockholders." *Id.* The court stipulated that one or more stockholder voting agreements cannot be combined with a Del. Code Ann. tit. 8, section 251(c) provision to force the stockholder vote so that the two "operate in concert as an *absolute lock up, in the absence of an effective fiduciary out clause.*" *Id.* at 939 (emphasis added). The court makes clear that this is the thrust of its consternation with the Genesis merger agreement in *Omnicare*: "The merger agreement and voting agreements, *as they were combined to operate in concert in this case*, are inconsistent with the NCS directors' fiduciary duties. . . . [and] [t]o that extent, we hold that they are invalid and unenforceable." *Id.* at 939 (emphasis added).

In this case, no fiduciary out clause is required in the Ravert Ward merger agreement because the BTRTA majority stockholder vote is not completely or irrevocably locked up. Said another way, the fact that the majority stockholder vote is not completely or irrevocably locked up in the Ravert Ward merger is, when considered in combination with the other deal protection measures, an effective fiduciary out because it allows the BTRTA board to effectively recommend against the Ravert Ward merger, if the board must to do so to satisfy its fiduciary obligations. Such a recommendation has the potential to successfully effect a transfer of majority shares, through a tender

offer or otherwise, and cause a successful stockholder vote against the merger. Accordingly, the Ravert Ward merger agreement is not a *fait accompli*, and is neither invalid nor unenforceable under *Omnicare*.

D. The Ravert Ward Deal Protection Measures Are Within a Range of Reasonable Responses

Even if deal protection measures are neither coercive nor preclusive, they must nevertheless fall with the "range of reasonableness"—an evaluation that entails a proportionality review—in order to survive enhanced scrutiny. *Id.* at 932 (citing *Unitrin*, 651 A.2d at 1367). This proportionality test requires that "[t]he board must demonstrate that it has reasonable grounds for believing that a danger to the corporation and its stockholders exists if the merger transaction is not consummated." *Id.* (citing *Unocal*, 493 A.2d at 955). Accordingly, directors satisfy the burden of this test by showing that they exercised "good faith and reasonable investigation" in agreeing to the deal protection measures at issue. *Unocal*, 493 A.2d at 955 (citing *Cheff v. Mathes*, 199 A.2d 548, 554-55 (Del. 1964)).

This Court was clear in *Unocal* that, when agreeing to deal protection measures, directors must be "motivated by a good faith concern for the welfare of the corporation and its stockholders, which in all circumstances must be free of any fraud or other misconduct." *Id.* at 955. In this case, the facts are totally devoid of any fraud or misconduct. In fact, Appellees have not alleged that the BTRTA directors engaged in any such behavior or conduct. Moreover, the

BTRTA directors entered into the Ravert Ward merger agreement, with its concomitant deal protection measures, out of a concern for providing the BTRTA stockholders a premium to market for their shares, as well as a concern for the continuity of the environmentally responsible practices that are of critical interest to both BTRTA and its stockholders. Accordingly, the BTRTA directors acted in good faith in this case.

This Court was also clear in *Unocal* that, when agreeing to deal protection measures, directors conduct a reasonable investigation by considering the adequacy or "inadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact on 'constituencies' other than stockholders (i.e., creditors, customers, employees, and perhaps even the community generally), the risk of nonconsummation, and the quality of securities being offered in the exchange." *Id.* at 955 (citing Martin Lipton & Andrew R. Brownstein, *Takeover Responses and Directors' Responsibilities: An Update*, ABA Nat'l Inst. on Dynamics Corp. Control 7 (1983), reprinted in 40 Bus. L. 1403 (1985)) (emphasis added). In this case, the BTRTA directors were concerned that the CFI merger would impair BTRTA's continued ability to promote environmentally responsible practices.

Accordingly, the directors took action. They shared their concerns with their financial advisor Eberhard Jefferson L.P. Eberhard put them in touch with Ravert Ward, a company with, as the Court of Chancery noted, a "reputation as a leading organizer of socially responsible corporate acquisitions." (Mem. Op. 10.) Ravert Ward was interested and made an initial offer of \$13 per share of BTRTA stock.

Although Ravert Ward's reputation aligned perfectly with BTRTA's corporate strategy, the BTRTA directors knew that they could not accept this initial offer because the price that Ravert Ward offered was insufficient—it failed to return to BTRTA stockholders a premium to market for their shares. BTRTA directors persevered, however, and secured a second offer from Ravert Ward—an offer that provided BTRTA stockholders with a premium to market for their shares and assured the continuity of BTRTA's environmentally responsible practices. Accordingly, the BTRTA directors conducted a reasonable investigation in this case.

Finally, both *Unocal* and *Omnicare* make clear that proof tending to show that directors exercised good faith and reasonable investigation in the approval of deal protection measures is materially enhanced when those measures are approved of by a board whose member majority is independent. *Omnicare*, 818 A.2d at 932 (citing *Unocal*, 493 A.2d at 955). In this case, seven of the nine BTRTA directors—over seventy-five percent of the BTRTA board that approved the Ravert Ward deal protection measures—are independent. Accordingly, there is no question that the BTRTA directors exercised good faith and reasonable investigation in this case.

E. The Rule from *Omnicare* Must Be Limited

The bar set by *Omnicare* must be limited. If it is not limited to its facts, as commentators have suggested⁵ and the Court of Chancery

⁵ E. Norman Veasey & Christine T. DiGuglielmo, *What Happened in Delaware Corporate Law from 1992-2004? A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399,1461 (2005) (suggesting that although "most objective observers believe that the majority decision

has done to-date in all cases but this one⁶, then it must be limited to the defensive measures at which the *Omnicare* court took aim⁷—namely, those measures which make it “mathematically impossible and realistically unattainable . . . for any other proposal to succeed, no matter how superior the proposal.” *Id.* at 936.

The preliminary injunction granted by the Court of Chancery in this case must be vacated because the stockholder voting agreements in this case do not irrevocably commit those shares to be voted in favor of the Ravert Ward merger. Accordingly, the BTRTA board of directors

[in *Omnicare*] was simply wrong. . . . if the reach of the decision is limited, it will not become necessary or practical for the court to overrule it”); Leo E. Strine, Jr., *If Corporate Action Is Lawful, Presumably There Are Circumstances in Which It Is Equitable to Take That Action: The Implicit Corollary to the Rule of Schnell v. Christ-Craft*, 60 Bus. Law. 877 (2005) (suggesting that the rule from *Omnicare* should be interpreted narrowly because it “rests, not on a debatable interpretation of a statute that might be corrected by a statutory amendment, but on the articulation of a bright-line rule of equity, the legislative overruling of which would involve an intricate and awkward statutory intrusion into an area of corporate law that is, otherwise, judge-made”);

⁶ See *In re OPENLANE S'holders Litig.*, 2011 WL 4599662 (Del. Ch. Sept. 30, 2011) (holding that a merger agreement that included a “sign and consent” provision—a provision requiring a majority of stockholders to approve or lock up the agreement within twenty-four hours after board approval—did not, in light of *Omnicare*, impermissibly force a transaction on stockholders, “deprive[ing] them of the right to receive alternative offers,” and characterized the transaction as “a matter of majority rule by stockholders who were under no obligation to act in any particular way”); *Orman v. Cullman*, 2004 WL 2348395 (Del. Ch. Oct. 20, 2004) (holding that, in light of *Omnicare*, an eighteen month lock-up of the majority stockholder vote did not have “the effect of causing [the target company’s] stockholders to vote in favor of the proposed transaction for some reason other than the merits of that transaction,” and was not “tantamount to a ‘fait accompli’”).

⁷ Justice Steele, in his *Omnicare* dissent, predicted that, “perhaps transactions that include ‘force-the-vote’ and voting agreement provisions that make approval a foregone conclusion will be the only deals invalidated prospectively.” *Omnicare* at 950.

is not required to have contracted for an explicit fiduciary out clause in the Ravert Ward merger agreement because the BTRTA board has not abdicated, limited, or circumscribed its fiduciary duties to BTRTA stockholders—either the majority or the minority stockholders. The Ravert Ward deal protection measures do, in fact, effectively protect the minority stockholders because the measures do not irrevocably combine a complete and irrevocable lock-up of the majority stockholder voting power with a Del. Code Ann. tit. 8, section 251(c) force-the-vote provision in a manner that causes the outcome of the stockholder vote to be a foregone conclusion.

CONCLUSION

For the foregoing reasons, the Court of Chancery's order preliminarily enjoining any action to effectuate the Ravert Ward merger agreement must be vacated in all respects.

Respectfully submitted,

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Dated: February 10, 2012