

IN THE SUPREME COURT OF THE STATE OF DELAWARE

---

---

BTETA 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., :  
: :  
Defendants Below- :  
Appellants, :  
: :  
v. :  
: :  
CONSOLIDATED FOREST INDUSTRIES Co., :  
A Delaware corporation, :  
: :  
Plaintiff Below- :  
Appellee. :  
:

---

No. 142, 2012

---

Court Below:  
Court of Chancery of  
the State of Delaware  
C.A. No. 6943-CJ

---

APPELLANT'S OPENING BRIEF

---

Team H  
Counsel for Defendants,  
Below-Appellants.

Date Filed: February 10, 2012

**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF CITATIONS..... iii

NATURE OF THE PROCEEDINGS..... 1

SUMMARY OF ARGUMENT..... 2

STATEMENT OF FACTS..... 3

ARGUMENT..... 5

**I. DELAWARE LAW PERMITS A CERTIFICATE OF INCORPORATION TO INCLUDE PROVISIONS WHICH ALLOW A BOARD OF DIRECTORS TO ACCEPT THE LOWER OF TWO CASH MERGER PROPOSALS IN FAVOR OF CORPORATE SOCIAL INTERESTS WITHOUT VIOLATING REVLON. .... 5**

A. Question Presented ..... 5

B. Scope of Review ..... 5

C. Merits of Argument ..... 5

        1. *Article II Is Valid Under Delaware Corporate Law Sections 102(b)(1) And 102(b)(7)*..... 5

a. Article II Is Valid Under Section 102(b)(1) ..... 5

b. Article II is Valid Under Section 102(b)(7) ..... 9

        2. *The Court’s Holding In Revlon Does Not Reduce A Corporation’s Power To Define The Board Of Directors’ Responsibilities In A Certificate Of Incorporation*..... 10

        3. *Article II Articulates Legislative And Judicial Recognition Of Public Policy Considerations In Mergers*..... 12

**II. THE COURT OF CHANCERY ERRED IN HOLDING THAT THE ACTIONS OF BTRTA’S BOARD OF DIRECTORS CONSTITUTED A BREACH OF FIDUCIARY DUTY . 14**

A. Question Presented ..... 14

B. Scope of Review ..... 14

C. Merits of Argument ..... 14

        1. *Revlon Duties Were Not Triggered By Either The CFI Merger Agreement Or The Ward Merger Agreement*..... 14

2. <i>The Board Did Not Breach Its Fiduciary Duties Of Care Or Loyalty By Exercising Its Ability To Accept The Ward Merger</i> .....	19
a. <u>Duty of Care</u> .....	19
b. <u>Duty of Loyalty</u> .....	21
3. <i>The Terms Of The Ward Merger Are Distinct From The Ones Invalidated In Omnicare</i> .....	22
4. <i>Because The Board Did Not Breach Its Fiduciary Duty, It Is Entitled To The Presumption Of Good Faith And Fair Dealing Under The Business Judgment Rule</i> .....	23
CONCLUSION.....	25

**TABLE OF CITATIONS**

**Cases**

*A.P. Smith Mfg. Co. v. Barlow*, 13 N.J. 145 (1953)..... 13

*Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270 (Del. 1994).... 5

*Aronson v. Lewis*, 473 A.2d 805 (Del. 1984)..... 23

*Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345 (Del. 1993)..... 14

*Gantler v. Stephens*, 965 A.2d 695 (Del. 2009)..... 15, 16, 17, 23-24

*In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573 (Del. Ch. 2010).. 15,  
16, 17, 18

*In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59 (Del. 1995). 17,  
19

*Kahn v. Household Acquisition Corp.*, 591 A.2d 166 (Del. 1991)..... 14

*McMullin v. Beran*, 765 A.2d 910 (Del. 2000)..... 23

*Nixon v. Blackwell*, 626 A.2d 1366, 1375 (Del. 1993)..... 5

*Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914 (Del. 2003). 1, 2,  
15, 22, 23

*Orman v. Cullman*, 794 A.2d 5 (Del. 2002)..... 24

*Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34 (Del. 1994) 6,  
7, 15, 16

*Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del.  
1986) ..... 1, 2, 11, 12, 14, 15, 17, 18, 19

*Seibert v. Gulton Industries, Inc.*, No. 5631, 1979 WL 2710 (Del. Ch.  
Jun. 21, 1979) ..... 7

*Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985)..... 20

*Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107 (Del. 1952)..... 7

*Uni-Marts, Inc. v. Stein*, CIV. A. Nos.14713, 14893, 1996 WL 466961  
(Del. Ch. 1996) ..... 6, 8

*Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985) 15, 21, 22

**Statutes**

Del. Code Ann. tit. 8, § 102 (2011) ..... 2, 7, 9, 8, 10, 13  
Del. Code Ann. tit. 8, § 141 (2011)..... 10  
Del. Code Ann. tit. 8, § 121(2011)..... 9, 10, 16  
Del. Code Ann. tit. 8, § 251 (2011)..... 11

**Other Authorities**

Ellen Taylor, *New and Unjustified Restrictions on Delaware Directors' Authority*, 21 DEL. J. CORP. L. 837, 857 (1996)..... 12

## NATURE OF THE PROCEEDINGS

This is an appeal from a decision of the Court of Chancery of the State of Delaware (Jeuell, Ch.) by BTĀta 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 (collectively "BTĀta"), Ravert Ward L.P. ("Ward"), and BTR Acquisition Corp., Defendants below.

Consolidated Forest Industries Co. ("CFI"), Plaintiff below, owns 4,300 shares of Defendant BTĀta's common stock. In a complaint dated December 16, 2011, CFI alleged BTĀta's board of directors breached its fiduciary duty by accepting a merger proposal for less cash per share than a merger agreement with CFI. The Court of Chancery issued its Opinion dated January 26, 2012. The Court relied upon CFI's interpretation of *Revlon* and *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 929 (Del. 2003); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 177 (Del. 1986). However, BTĀta's case is distinct, because the board had no financial self interest and acted in compliance with Article II of its certificate of incorporation to serve the best interest of its stockholders in the merger.

On January 31, 2012, the court ordered a preliminary injunction against BTĀta from taking any action to effectuate, enforce, or consummate any term or provision of the merger agreement among BTĀta, Ward, and BTR Acquisition Corp. Later that day, this Court accepted BTĀta's expedited interlocutory appeal from the Court of Chancery's Opinion and Order.

## SUMMARY OF ARGUMENT

1. The Court of Chancery erred in holding Article II is invalid. Under Delaware law, Article II is valid and permits the BTĀta board of directors to accept the lower of two cash merger proposals based on socially responsible corporate considerations without violating *Revlon*. More specifically, Delaware law permits BTĀta to contract with its shareholders through its certificate of incorporation to define their fiduciary duties in executing corporate social policy during a merger. First, Article II is valid under Delaware General Corporation Law §§ 102(b)(1) and 102(b)(7) because of the express language in the statute. Second, *Revlon* does not mandate that BTĀta's board of directors' may only consider wealth maximization in determining whether a merger will best suit the corporation's socially responsible goals. Third, Article II is valid in effectuating legislative and judicial recognition of public policy considerations when pursuing a merger.

2. The Court of Chancery erred in holding that the actions of BTĀta's board of directors constituted a breach of fiduciary duty. First, *Revlon* duties were not triggered by either the CFI Merger or the Ward Merger. Second, the board did not breach its fiduciary duties of loyalty or care by exercising its ability to accept the Ward Merger. Third, the terms in the Ward Merger are distinct from the techniques invalidated in *Omnicare*. Finally, because the board did not breach its fiduciary duties, it is entitled to the presumption of good faith and fair dealing under the business judgment rule.

## STATEMENT OF FACTS

In 1987 Defendants Matthew Sunstein and Vikram Sarabhai (“BTṚta founders”) formed an environmentally sustainable foresting business, BTṚta, in pursuing their passion for environmentalism. *Consolidated Forest Ind. Co., v. BTṚta Forest Products, Inc.*, C.A. No. 6943-CJ, at 4-5 (Del. Ch. 2012).

Initially BTṚta expanded through bank loans and equity infusions from friends and family. *R.* at 5. In late 2000, BTṚta engaged in an initial public offering. *Id.* BTṚta’s certificate of incorporation provided for 25,267,042 shares of Class A stock, and 2,567,304 shares of Class B stock. *Id.* All of the Class B stock was owned by BTṚta’s founders and constituted about 50.4% of voting power. *Id.*

In 1997, long before BTṚta’s initial public offering, BTṚta’s founders adopted Article II into the certification of incorporation (“Article II”). *R.* at 6-7. Article II provides that “[a] Director is entitled to rely upon the definition of ‘best interests’ . . . and such reliance shall not be construed as a breach of a Director’s fiduciary duty, even in the context of a Change in Control Transaction. . . .” *R.* at 6. In BTṚta’s certification, a “Change in Control Transaction” includes mergers. *Id.* The prospectus of Class A stocks also contained a description of Article II. *R.* at 7.

In 2011, BTṚta’s founders became disenchanted with their role in managing BTṚta as a publicly traded company, and the board began to pursue bids for acquiring BTṚta. *R.* at 8. In September 2011, CFI proposed a merger at \$16.50 per share. *R.* at 9. BTṚta founders were concerned with CFI’s logging practices and status as a publicly held

company. *Id.* In response, CFI increased its offer to \$17 a share. *Id.* On October 17, 2011, a merger agreement ("CFI Merger") was signed. *Id.*

The CFI Merger provided that BTĀta was allowed to terminate the agreement in the event of a Superior Proposal during a sixty-day period following board approval. *R.* at 10. A Superior Proposal included any merger that the board deemed in good faith best served the interests of the company. *R.* In defining what served the best interests of the company in electing for a Superior Proposal, CFI endorsed Article II's environmentalist goals. *Id.* During the sixty-day period, one merger offer was sought from Ward ("Ward Merger"), a socially responsible buy-out firm. *Id.* No other offers were tendered. *Id.*

In late November, 2011, after an initial offer in October for \$13 a share, Ward provided a Superior Proposal at \$15.50 per share. *R.* at 11. Ward's practices were more attractive because of its commitment to corporate social responsibility. *R.* at 9. The \$15.50 offer was still a premium over pre-merger BTĀta stock. *R.* at 11. The merger agreement included a stipulation that BTĀta would not be permitted to solicit competing merger proposals. *R.* at 12. On December 13, 2011 the board approved the Ward Merger. *Id.*

BTĀta informed CFI of the Ward Merger on December 13, 2011. *R.* at 13. CFI commenced action against BTĀta on December 16, 2011, seeking a preliminary injunction against consummation of the Ward Merger. The Court of Chancery issued a preliminary injunction on January 31, 2012, and granted interlocutory appeal on February 10, 2012. This court should reverse the Court of Chancery's Opinion and Order.

## ARGUMENT

### **I. DELAWARE LAW PERMITS A CERTIFICATE OF INCORPORATION TO INCLUDE PROVISIONS WHICH ALLOW A BOARD OF DIRECTORS TO ACCEPT THE LOWER OF TWO CASH MERGER PROPOSALS IN FAVOR OF CORPORATE SOCIAL INTERESTS WITHOUT VIOLATING REVLON.**

#### A. Question Presented

Does Delaware law prohibit a corporation's board of directors from including in its certificate of incorporation a provision which allows the board of directors to consider the social and environmental impact of a merger agreement?

#### B. Scope of Review

The threshold question is the applicable legal standard by which a board of director's conduct is to be judged. Statutory interpretation is a legal question and reviewed *de novo* by this Court. *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1287 (Del. 1994); *Nixon v. Blackwell*, 626 A.2d 1366, 1375 (Del. 1993).

#### C. Merits of Argument

The Court of Chancery erred in granting the Plaintiffs' preliminary injunction and in holding that BTĀta's certificate of incorporation contravened Delaware law because: (1) Article II is valid under Delaware Corporations Law; (2) the Court's holding in *Revlon* is inapplicable to BTĀta's actions; and (3) legislative and judicially recognized public policy considerations favor Article II's permissibility.

#### 1. *Article II Is Valid Under Delaware Corporate Law Sections 102(b)(1) And 102(b)(7)*

##### a. Article II Is Valid Under Section 102(b)(1)

Article II of BTRta's certificate of incorporation is valid under Delaware Corporation Law. To determine whether a particular provision of a certificate of incorporation is valid, courts should first look to the applicable statutes governing the provision. *Uni-Marts, Inc. v. Stein*, CIV. A. Nos.14713, 14893, 1996 WL 466961, at \*3 (Del. Ch. 1996). In construing a statute, "the literal meaning of the words employed" is the "first and most powerful source of interpretative direction to a court charged to apply that law. . . ." *Id.* In other words, courts should apply the plain language of the statute.

Delaware statutory law gives corporations broad powers. More specifically, a corporation has the general power to do anything permitted by law or its certificate of incorporation. See Del. Code Ann. tit. 8, § 121(a) (2011) ("[E]very corporation, its officers, directors and stockholders shall possess and may exercise all the powers and privileges granted by this chapter or by any other law or by its certificate of incorporation, together with any powers incidental thereto . . .").

In exercising the broad authority that Delaware corporations have, the board of directors has equally expansive powers. As long as the corporation is conducting lawful business, its board of directors has wide discretion to make business decisions. Del. Code Ann. tit. § 141(a) (2011). This Court has averred that it is a "fundamental principle that the management of the business and affairs of a Delaware corporation is entrusted to its directors, who are the duly elected and authorized representatives of the stockholders." *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 41-42 (Del. 1994). The

directors' power to conduct the corporation's business includes the capacity to enter into contracts through the certificate of incorporation. Del. Code Ann. tit. 8, § 122(13) (2011). Upon purchasing BTĀta stock, each shareholder contractually agreed to Article II.

Section 102(b)(1) of the Delaware General Corporation Law specifies the requirements for certificates of incorporation. Del. Code Ann. tit. 8, § 102(b)(1). It provides, in relevant part, that the certificate of incorporation may include, "any provision for the management of the business and for the conduct of the affairs of the corporation. . ." including "creating, defining, limiting and regulating the powers of the corporation" as long as such provisions do not contravene Delaware law. *Id.*

Here, CFI argues that Article II is invalid because any actions by BTĀta, which do not result in stockholder maximization of wealth during a merger, would be "contrary to the laws" of Delaware. Courts have interpreted contrary to the laws to mean contrary to a specific statute or contrary to public policy. *Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107, 110 (Del. 1952). In fact, courts have found that it is permissible to incorporate a provision that contravenes the common law, so long as the provision does not violate a (1) statute or (2) public policy. *Seibert v. Gulton Industries, Inc.*, No. 5631, 1979 WL 2710, at \*518 (Del. Ch. Jun. 21, 1979) (quoting *Sterling*, 93 A.2d at 111).

First, no statute under Delaware law prevents a board of directors from considering other important stockholder interests.

Instead, the opposite is actually true. For example, in section 251 the legislature did not include any provisions preventing a board of director from considering social ends when pursuing a merger. Del. Code Ann. tit. 8, § 251.

Second, a provision requiring a board of directors to consider the environmental and social impact of a merger does not violate public policy. Rather, Delaware case law has emphasized the importance of formal compliance with statutory law in the corporate arena because formality "has significant utility for business planners and investors." *Uni-Marts*, 1996 WL 466961, at \*9. Here, voiding a contract due to vaguely defined common law rules, which do not appear in any Delaware statutes, engenders uncertainty in the law. Businesses are unlikely to enter into contracts or conduct efficient business if they are concerned that every corporate decision will be overturned by the courts. Public policy favors promoting formality and certainty. *Id.* Therefore, when "a limitation is not imposed by statute, the courts should not limit directorial power." Ellen Taylor, *New and Unjustified Restrictions on Delaware Directors' Authority*, 21 DEL. J. CORP. L. 837, 857 (1996).

In the present case, Article II conforms to *Sterling* and is not contrary to any statute or public policy. For example, in conformity with the express language of section 251, BTŕta was created out of its founders passion for both engineering and environmentalism, and the majority of its initial equity came from family and friends. R. at 2. Additionally, like the court's suggestion in *Unimart*, the prospectus for all Class A stock offerings expressly stated the mission

established in Article II making it highly likely that potential stockholders invested in BTRta because of its commitment to socially responsible corporate governance.

Finally, it is also important to note that not only should BTRta's board be bound by Article II - but CFI is also bound by it. The CFI Merger permitted BTRta to seek out a Superior Proposal, defined as: "any merger proposal that BTRta's board of directors deemed in good faith would better serve the best interests of the Company [BTRta], as defined under Article II of BTRta's certificate of incorporation." R. at 10 (emphasis added). Despite this explicit acceptance by CFI in defining a Superior Proposal to include Article II, CFI now claims that the conferral of such authority is illegal. Here, CFI should be estopped from claiming Article II's illegality because of its acceptance in the initial merger.

b. Article II is Valid Under Section 102(b)(7)

Under Delaware General Corporation Law section 102(b)(7), a corporation is generally permitted to include in its certificate of incorporation a provision which eliminates or limits the liability of directors for breach of fiduciary duty except under specific circumstances. Del. Code Ann. tit. 8, § 102(b)(7). Under this section, a certificate of incorporation may eliminate liability except;

(i) . . . [F]or any breach of the director's duty of loyalty to the corporation or its stockholders; (ii.) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under Section 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit. *Id.*

In order for CFI to prevail on a claim that Article II should not be upheld under section 102(b)(7) the contested provisions must fall

under one of these four exceptions. However, Article II's limitations do not fall under any of these exceptions.

Instead, Article II does not immunize the directors from a breach of duty of loyalty to the corporation. *Id.* Here, the provision of the certificate instead expands the obligations that BTĀta must maintain with its stockholders. The directors are entitled to rely upon the definition of best interest, [but] are required to do so. R. at 6. Contrary to CFI's claim, this provision serves to meet the ends desired by its majority shareholders in protecting the founder's environmentalist vision. By accepting the Ward Merger, BTĀta's stockholders would benefit as it was more likely that the Ward would continue to manage their operations in accordance with its previous environmentally responsible practices. R. at 11.

By adhering to Article II's intent, the board is acting in what it believed to be the best interest of the corporation as defined by Article II and not contrary to section 102(b)(7)(ii). CFI does not contend that there is a potential limitation under section 102(b)(7)(iii). Additionally, CFI has already acknowledged that BTĀta founder's decision to merge does not involve any financial self-dealing and the founders are receiving the same price per share as the public stockholders. This is not in violation of section 102(b)(7)(iv).

*2. The Court's Holding In Revlon Does Not Reduce A Corporation's Power To Define The Board Of Directors' Responsibilities In A Certificate Of Incorporation.*

The Court's holding in *Revlon*, that the board has a duty to its stockholders to maximize their profits in certain situations, does not

control in assessing BTRta's merger. In *Revlon*, Pantry Pride attempted to acquire an unwilling Revlon. *Revlon*, 506 A.2d 173 at 177. Although it is unclear why Revlon resisted acquisition by Pantry Pride, it appears that Revlon's chairman personally disliked Pantry Pride's chairman. *Id* at 176. When Pantry Pride made a cash tender offer for all shares of Revlon, Revlon's board rejected Pantry Pride's offer and began negotiating with other parties. *Id* at 177. Revlon negotiated instead with Forstman Little & Co. ("Forstman") regarding a leveraged buyout. *Id* at 178. Revlon took various defensive measures to prevent Pantry Pride's acquisition including creating a poison pill, initiating a lock-up option, and a no-shop provision. *Id* at 175. Additionally, Revlon showed Forstmann financial data, which it refused to provide Pantry Pride. *Id* at 178. Revlon ultimately accepted an offer from Forstmann which was less favorable to its stockholders best interests, as defined by this Court. *Id.* At 184. In accepting Forstmann's agreement, this Court held that Revlon breached its fiduciary duty. *Id.* at 180.

In the present case, *Revlon* has no bearing if Article II is valid. In *Revlon*, the board of directors had no authority to choose the lower of two offers other than the traditional authority that boards of directors have in accepting a merger. *Id.* Here, the board of directors acted directly under the authority granted to them in Article II. More specifically, the certificate required the board to take into consideration social and environmental factors when considering a merger. In fact, if the directors had not pursued the Ward Merger, they would have violated their fiduciary duties to their

stockholders - many of whom likely invested in the company because of its environmental and social policies.

Not only did the board in *Revlon* not act pursuant to a certificate of incorporation, but it is factually different from *BT&T*'s case. In *Revlon*, the board may have rejected the Pantry Pride merger because *Revlon*'s chairman personally disliked Pantry Pride's Chairman. *Revlon* at 176. No such personal animosity has been alleged on the part of *BT&T*'s board. Additionally, *Revlon*'s board never gave a good faith consideration to Pantry Pride's offer and was determined to reject it. *Id.* On the other hand, in the present case, *BT&T* considered CFI's offer in good faith, and even agreed to it before a Superior Proposal surfaced. Moreover, *Revlon*'s board also took defensive measures including creating a lock-up agreement and allowing exclusive exposure of certain financial data to the buyout firm. *Id.* at 176-78. This placed the two parties on unequal footing. *Id.* at 178. Here, however, *BT&T* considered both offers on an equal footing and simply determined that, on balance, Ward's offer was superior because it would allow *BT&T* to continue to fulfill its mission.

*3. Article II Articulates Legislative And Judicial Recognition Of Public Policy Considerations In Mergers*

CFI's contention that that directors must solely maximize shareholders' profits when considering merger agreements to the exclusion of all other important corporate considerations and goals is contrary to public policy. Both the courts and the legislature have expressed keen interest in protecting public policy considerations for boards of directions in making decision. First, the legislature has indicated that companies should act in a socially conscious manner.

For example, section 122(9) of Delaware Corporation Law provides that corporations have the power to “make donations for the public welfare or for charitable, scientific or educational purposes. . . .” Del. Code Ann. tit. 8, § 122(9). Such donations clearly do not maximize stockholders’ profits—but rather, in the short term donations actually reduce shareholder profits.

Additionally, courts have also emphasized the importance of acting in a socially conscious manner to protect stockholder interests. In a landmark case, the New Jersey Supreme Court explained why such donations are acceptable, even commendable and to be encouraged, despite the fact that they are not in the immediate short-term economic interests of shareholders. *A.P. Smith Mfg. Co. v. Barlow*, 13 N.J. 145, 150 (1953). As large corporations have increasingly dominated the economy and amassed more wealth, society needs corporations “to assume the modern obligations of good citizenship in the same manner as humans do.” *Id.* It is not only within the rights of corporations to promote the general welfare, it is arguably their duty to do so. “[M]odern conditions require that corporations acknowledge and discharge social as well as private responsibilities as members of the communities within which they operate.” *Id.* at 154. Article II’s requirement that directors consider the impact that their business decisions have on the environment and society commendably incorporates this spirit into BT&T’s certificate of incorporation, a public spirit which courts should and do endorse, not penalize.

## II. THE COURT OF CHANCERY ERRED IN HOLDING THAT THE ACTIONS OF BTRTA'S BOARD OF DIRECTORS CONSTITUTED A BREACH OF FIDUCIARY DUTY

### A. Question Presented

Whether the board of directors breached its fiduciary duties by entering into the Ward Merger?

### B. Scope of Review

A claim of a breach of fiduciary duty of care or duty of loyalty is a question of law and is reviewed by this Court *de novo*. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993) (citing *Kahn v. Household Acquisition Corp.*, 591 A.2d 166, 175-76 (Del. 1991)).

### C. Merits of Argument

The Court of Chancery erred in granting the Plaintiffs' preliminary injunction by holding that the board breached its fiduciary duties to its shareholders because: (1) the "Revlon duties" of the board were not triggered by the CFI or Ward Merger; (2) the board did not breach its fiduciary duties of care or loyalty by exercising its ability to enter into the Ward Merger; (3) the terms of the Ward Merger are distinct from the merger techniques invalidated in *Omnicare*; and (4) because there was no breach of fiduciary duty the board should be entitled to the presumption of good faith and fair dealing of the business judgment rule.

#### *1. Revlon Duties Were Not Triggered By Either The CFI Merger Agreement Or The Ward Merger Agreement*

The board's decision to enter into the Ward Merger should not be subjected to enhanced judicial scrutiny because the *Revlon* duties were not triggered. See *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 928 (Del. 1985). *Revlon* duties are triggered if the sale of the

company is inevitable, when a board decides to enter into a merger that will result in a change in corporate control, or when the corporation is engaged in an active bidding process to sell itself. *Omnicare*, 818 A.2d 914 at 929.

Under enhanced judicial scrutiny directors are required to make a reasonable decision, not a perfect decision, and is subject to a two-part test. *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 595 (Del. Ch. 2010). First, there must be "a judicial determination regarding the adequacy of the decisionmaking process employed by the directors, including information on which the directors based their decision." *Paramount*, 637 A.2d at 45. Second, there must be "a judicial examination of the reasonableness of the directors' action in light of the circumstances then existing." *Id.*

A board's pursuit to sell a company when receiving non-viable bids will not trigger *Revlon* duties. See *Gantler v. Stephens*, 965 A.2d 695, 704-06 (Del. 2009). In *Gantler v. Stephens*, this Court held that enhanced judicial scrutiny was not proper with respect to the decision of the board to abandon the sale of the company and instead pursue a reclassification of voting rights of stock through a shareholder proxy. *Id.* at 704. The board of directors originally pursued a plan to sell the company and received three bids. *Id.* at 700. Concluding that none of these bids were viable, the board decided to pursue an alternate course, which would reclassify certain shares in the company, allowing the company to privatize itself. *Id.* at 701. In this case, this Court refused to apply the enhanced judicial scrutiny

because the directors did not take defensive measures to avoid a change in corporate control. *Id.* at 705.

Additionally, if *Revlon* duties are triggered, courts look to the reasonableness of the board's actions in relation to a company's financial stability when applying enhanced judicial scrutiny. See *Paramount*, 637 A.2d at 45. For example, in *Dollar Thrifty*, the court applied the enhanced judicial scrutiny to the Dollar Thrifty board's decision to merge with Hertz, finding a reasonable relation between the actions of the board and the circumstances surrounding the merger. *Dollar Thrifty*, 14 A.3d at 613. In that case, the financial position of Dollar Thrifty and the increasing competition in the rental car business led the board to decide to sell control of the company. *Id.* at 576. Dollar Thrifty engaged in talks with both Hertz and Avis, two rival companies, and came to an agreement with Hertz of a price of \$41 per share, a 7.5% premium over the trading price of the stock. *Id.* at 592. After agreeing to the merger with Hertz, the Dollar Thrifty board considered additional proposals from Avis, but found none of them to be superior to the Hertz agreement. *Id.* at 594. Applying the *Revlon* standard, the court found that the actions of the board were reasonable because the financial position of Avis left it unable to make a firm bid. *Id.* at 607. The court also found that the board acted in the best interests of the company by consummating the merger with Hertz. *Id.* The court further found that "the Board's decision to sign up the Merger Agreement was a reasonable approach to value maximization given the circumstances. The Board had a firm handle on

the company's prospects and had considered its fundamental value." *Id.* at 611.

Further, courts have declined to find that a company is engaged in an active bidding process absent a full sale of corporate control. See *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 71 (Del. 1995). In *Santa Fe Pacific* this Court declined to find that the board initiated an active bidding process. *Id.* *Santa Fe*, the target company, first entered into a merger agreement with Burlington. *Id.* at 63. This merger agreement was subject to several restrictions, including a provision that prevented Santa Fe from entering into a merger agreement with another company, regardless of whether the offer was for a higher price, and a no-shop clause. *Id.* Despite Santa Fe's warning that it would be unable to accept a higher offer, Union Pacific offered to merge with Santa Fe at a price that was higher than the proposed Burlington merger. *Id.* The Santa Fe board rejected the proposal from Union Pacific and the Santa Fe shareholders filed suit. *Id.* at 63-64. This Court found that the board did not enter into an active bidding process because it did not find that Santa Fe was committed to selling itself to Burlington. *Id.* at 71.

In the present case, the *Revlon* duties of the board of BTRta were not triggered with respect to either transaction. First, the sale of the company was not inevitable. *R.* at 7-13. Like the board in *Gantler* which had other options to pursue in lieu of a merger, so did the BTRta board. *Gantler*, at 701-02; *R.* at 7-8. The BTRta board chose to sell the company simply because the BTRta Founders were "disenchanted with their role and responsibilities of managing . . . a publicly held

company," but were free to pursue other options at any time. R. at 7. While BTĀta founders believed the best course of action would be to sell the company, there were other options available of which the directors could have taken advantage. R. at 8.

Further, the change in corporate control was not a foregone conclusion by virtue of the CFI Merger. R. at 9. Unlike the board in *Dollar Thrifty* where the board's only option was to sell full control of the company, BTĀta founders were planning on maintaining an active role within the company. *Dollar Thrifty*, 14 A.3d at 585-93; R. at 9. Before the company entered into the CFI Merger, BTĀta founders were going to serve as environmental consultants to the CFI board and "would be consulted on any significant alteration of CFI's environmental practices in relation to the operations being acquired from BTĀta." R. at 9. Also, prior to the consummation of the Ward Merger, the BTĀta founders were assured that they would have an active role in ensuring that Ward continued BTĀta's commitment to environmentally safe practices and would have an active role in implementing that commitment. R. at 11. Because both the CFI and Ward Mergers provided that the BTĀta founders would maintain some element of control, this case is factually distinguished from cases like *Revlon* and *Dollar Thrifty* where there was a full sale of corporate control. See *Revlon* 506 A.2d 173 at 177; see *Dollar Thrifty*, 14 A.3d at 585. Here, the BTĀta founders maintained control of the essence of BTĀta, its environmentally safe practices and ensuring that the acquiring company, either CFI or Ward, continues those practices. R. at 9,12. Additionally, because the change in

corporate control was not inevitable, the company could not have been engaged in an active bidding process to sell the company under the reasoning in *Santa Fe*. *Santa Fe*, 669 A.2d at 72. The BTĀta founders were still going to maintain an active role in the merged company's decision-making as consultants and would have considerable influence over the BTĀta practices acquired by either CFI or Ward. R. at 9,12.

As a result, because there was no inevitable sale of BTĀta, there was no change in corporate control, and the company was not engaged in an active bidding process to sell itself, the duties of the board under *Revlon* are not triggered and these transactions are not analyzed under enhanced judicial scrutiny.

*2. The Board Did Not Breach Its Fiduciary Duties Of Care Or Loyalty By Exercising Its Ability To Accept The Ward Merger*

The board's decision to accept the Ward Merger over the CFI Merger was not a breach of the board's fiduciary duties of care or loyalty because the board's conduct did not rise to the level of gross negligence to breach the duty of care, and the board did not act in a self-interested manner in order to breach the duty of loyalty. Further, the board did not breach its duty of loyalty by entering into the Ward Merger because the board was acting in the best interests of the company under Article II.

a. Duty of Care

The board of BTĀta did not breach the fiduciary duty of care by accepting the Ward Merger because the board was well-informed of the terms of the merger and made the best decision for the corporation when recommending the merger to its shareholders. The duty of care encompasses a director's responsibility to exercise informed business

judgment when making decisions on behalf of the corporation. *Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985). In order for a director to be held liable for a breach of the duty of care, the director's actions must rise to the level of gross negligence when becoming informed. *Id.*

In *Van Gorkom*, this Court found that the directors of Trans Union had breached their fiduciary duty of care when recommending a merger to its shareholders. *Id.* Prior to approving the merger and submitting it to its shareholders for approval, the board of Trans Union relied solely on a one-hour presentation by the CEO, Van Gorkom. *Id.* at 869. This Court found that the board had failed to exercise its duty of care by approving the merger because it was not adequately informed of Van Gorkom's role in the sale of the company and it was not aware of the intrinsic value of the company. *Id.* at 874. Further, the Court held that the when becoming informed decision makers must utilize the information that is reasonably available. *Id.*

In the present case, there is no issue regarding BTŕta board not being informed or of gross negligence on the part of the board. Unlike the board in *Van Gorkom*, which relied solely on a one hour presentation by its CEO before approving the merger, the board of BTŕta was well-informed about its options before approving the Ward Merger. *Id.* at 869; *R.* at 7-8. The BTŕta board retained a financial advisor to help the company explore its options before BTŕta founders committed to pursuing a merger. *R.* at 8. The board expressed their concerns that the sale should also include the Class B shares held by BTŕta founders. *R.* at 8. Not only was the BTŕta board well-informed

of the consequences of the mergers between CFI and Ward, but also, the board was instrumental in helping BTĀta founders in making their decision to merge the company. Because of the level of involvement by the board, any claim of breach of fiduciary duty of care is defeated.

b. Duty of Loyalty

While Plaintiffs agree that the directors of BTĀta were not motivated by any self-interest in pursuing the Ward Merger, the directors and the board did not breach a fiduciary duty of loyalty by failing to enter into the CFI Merger. This Court has ruled that a defensive measure taken by a corporation must be reasonable in relation to the threat posed. *Unocal*, 493 A.2d at 955.

In *Unocal*, this Court held that a corporation has a duty to act in the best interests of its shareholders, however, the board may take into account the effect a transaction may have on the corporate enterprise. *Id.* The Court validated the rejection of an offer to acquire Unocal by Mesa, a minority shareholder of Unocal, because of its threat to the corporate enterprise of Unocal. *Id.* at 949. This Court asserted that the board must take into consideration the best interests of the *corporation* and the shareholders, which includes, "the price offered, the nature and timing of the offer, questions of illegality, the impact on 'constituencies' other than shareholders (i.e. creditors, customers, employees, and perhaps the community generally), the risk of nonconsummation, and the quality of securities being exchanged." *Id.* at 955 (emphasis added).

The present case is a situation which the *Unocal* court envisioned. The main concern of the board was the continuation of

BTṚta's environmentally safe practices. Further, BTṚta founders and the board were considering the impact the merger would have on its shareholders in addition to its stakeholders. R. at 11-12 ("Ravert Ward assured BTṚta that BTṚta's operations would continue to be managed in accordance with its precious environmentally responsible practices. . . ."). Here, the board did not breach a fiduciary duty by rejecting the CFI Merger because the shareholders still received a price above market value for their shares of BTṚta stock and the shareholder endorsed environmentally safe practices will continue under Ward.

*3. The Terms Of The Ward Merger Are Distinct From The Ones Invalidated In Omnicare*

Although the means by which BTṚta's board accepted the Ward Merger bears a close resemblance to the techniques invalidated in *Omnicare*, several important distinctions exist which support the validity of the Ward Merger. See *Omnicare*, 818 A.2d 914.

In *Omnicare*, this Court invalidated the merger techniques used by a financially distraught pharmacy service provider. *Id.* at 930. This Court reasoned that the combined terms of the voting agreements and the merger proposed would result in an automatic approval by its stockholders - and were therefore unreasonable under the *Unocal* enhanced scrutiny standard. *Id.* at 938. This Court found that in the absence of an effective fiduciary out clause, the defensive measures used to prevent other bids from interested parties constituted preclusive and coercive practices which this Court found were invalid and unenforceable. *Id.*

However, unlike in *Omnicare*, BTĀta's did not merger with Ward because of financial instability. Instead, BTĀta's founders sought out a merger in order to refocus their passion for sustainably harvested trees and minimizing the adverse environmental impact of paper production. R. at 4. Additionally, unlike in *Omnicare*, where the techniques used to prevent other bidders created an effective lock up, the Ward Merger came after BTĀta announced its intent to merge and received no additional proposals. R. at 7-9. Moreover, the Ward Merger was made in late November 2011 when the sixty-day waiting period under the CFI Merger was nearing its end - and the board would be unable to accept new merger proposals. R. at 11. As a result, the techniques invalidated in *Omnicare* bear little resemblance to those employed in the Ward Merger.

4. *Because The Board Did Not Breach Its Fiduciary Duty, It Is Entitled To The Presumption Of Good Faith And Fair Dealing Under The Business Judgment Rule.*

Since the actions of the board survived enhanced judicial scrutiny, and the board did not breach its fiduciary duties to its shareholders, the board's actions are entitled to be analyzed under the business judgment rule. The business judgment rule is "a presumption that in making a business decision the directors of a 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." *McMullin v. Beran*, 765 A.2d 910, 916 (Del. 2000) (quoting *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984)). In order to satisfy the business judgment rule the board must reach its decision in good faith and the board must reach the decision advisedly. *Gantler*, 965

A.2d at 706. The presumption of the business judgment rule may be rebutted, however, if the plaintiff is able to plead specific facts alleging breaches of fiduciary duties by individual members of the board. *Orman v. Cullman*, 794 A.2d 5, 23 (Del. 2002). If the plaintiff is able to establish that a majority of the directors were personally interested in the transaction then the presumption of the business judgment rule is defeated. *Id.*

The actions of the BTĀta board easily satisfy the business judgment rule. First, the board reached the decision to enter into the Ward Merger with the belief that the long-term interests of the company would continue under Ward rather than CFI due to CFI's logging practices, the size of its operations, and CFI's status as a publicly held company. *R.* at 9. Further, the board reached this decision advisedly because it sought out Ward to submit a bid, a company with a reputation in corporate social responsibility, and a company committed to continuing BTĀta's environmentally safe practices. Further, as the parties agreed, there was no element of self-interest on the part of the BTĀta founders when entering into either transaction. Because the plaintiffs are unable to allege any breaches of fiduciary duties, the plaintiffs are not able to overcome the presumption of good faith and fair dealing under the business judgment rule.

Therefore, since this transaction was not subject to any self-dealing by BTĀta's founders, and the board arrived at its decision to enter into the Ward Merger on an informed basis, this Court must defer to the decision of the board and presume that the board acted in good faith when discharging its duties.

## CONCLUSION

Under Delaware law Article II is valid and permits its directors to accept the lower of two cash merger proposals based on socially responsible corporate considerations without violating *Revlon's* mandate. Additionally, the Court of Chancery erred in holding that the actions of BTĀta's board of directors constituted a breach of fiduciary duty and required a preliminary injunction. Therefore, this Court should reverse the Court of Chancery's decision to preliminarily enjoin BTĀta's merger with Ward.

Respectfully submitted,

Team H,  
Attorneys for Appellants.  
February 10, 2011