IN THE SUPREME COURT FOR THE STATE OF DELAWARE

No. 142, 2012

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.,	:	On Appeal from the Court of Chancery of the State of Delaware
Defendants Below-Appellants	:	Civil Action No. 6943-CJ
v.	:	
Consolidated Forest Industries,	:	
Plaintiff Below-Appellee	:	

APPELLANTS' OPENING BRIEF

Team "I"
Counsel for Appellants

February 10, 2012

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NATURE OF PROCEEDINGS

This interlocutory appeal comes to the Court as a result of a Preliminary Injunction Order of the Court of Chancery of the State of Delaware entered on January 31, 2012. Defendants, 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, and William D. Hemphill ("BTRta" or "Defendants") appeal to the Court to overturn the Order and permit a merger between BTRta and Ravert Ward L.P.("Ravert Ward")to proceed.

On October 17, 2011, BTRta executed a merger agreement with Consolidated Forest Industries ("CFI" or "Plaintiff"). Op. 9. On December 13, 2011, BTRta directors informed CFI that they instead intended to consummate a merger with Ravert Ward as a result of Ravert Ward's Superior Proposal. Op. 13. On December 16, 2011 CFI brought suit against BTRta to enjoin the merger between BTRta and Ravert Ward, alleging that such a merger would be in violation of the BTRta directors' fiduciary duties. Op. 13. On January 26, 2012, Chancellor Jeuell granted Plaintiff's motion for a preliminary injunction and entered the Order on January 31, 2012. Prelim. Inj. Order. Chancellor Jeuell concluded that BTRta's board of directors violated their fiduciary duties as defined under the *Revlon* Doctrine by not obtaining the highest sale price for shareholders, and also violated *Omnicare* precedent regarding defensive tactics. Op. 16-17. On February 10, 2012, this Court accepted the appeal made by Defendants. Order Accepting Interlocutory Appeal 2.

SUMMARY OF ARGUMENT

1. Article II of BTRta's Certificate of Incorporation is a valid and enforceable contract provision. Delaware statutes allow corporate charters to contract around common law if the provisions comport with public policy. Article II requires BTRta directors to carry out their actions with due care and in the shareholders' best interests, while also permitting them to consider social and environmental factors in change of control transactions. Article II agrees with the Revlon Doctrine, which is merely a common law application of the fiduciary duties of care and loyalty. This Court should interpret the Revlon Doctrine to find Article II valid and enforceable, as the directors acted in accordance with shareholder interests and public policy.

2. Plaintiff's Omnicare claim likewise fails. The fact that the deal protections at issue here resemble those invalidated in Omnicare is not dispositive because the Omnicare holding is incorrect and must be overturned. When the Court correctly applies Delaware law, the deal protections must be upheld under the business judgment rule. Delaware courts must defer to directors' business judgment unless there is evidence that the directors acted in bad faith, without due care, or with self-interest. Here, there is no evidence that the BTRta directors acted improperly when adopting the deal protections, so the Court must defer to the directors' business judgment. However, even if the Court wrongly ignores the business judgment rule, the deal protections are still valid under heightened Unocal scrutiny because the directors reasonably perceived a threat to BTRta's environmental policies and reasonably responded by securing the Ravert Ward deal.

STATEMENT OF FACTS

In 1987 Matthew Sunstein and Vikram Sarabhai formed BTRta, a corporation engaged in the manufacture and sale of paper products using environmentally sustainable production techniques. Op. 4-5. In 1997, Sunstein and Sarabhai sought a capital infusion from a venture equity firm. Op. 5. In anticipation of this deal, they added Article II to the BTRta Certificate of Incorporation. Op. 5. Article II and the accompanying Prospectus lay out Sunstein and Sarabhai's commitment to the "long-term sustainability of both the Company's operations and the environments in which the Company operates, even if stockholder value is not maximized." Op. 7.

Under BTRta's Certificate of Incorporation, BTRta has two classes of common stock: Class A and Class B. Op. 5. The two classes have identical rights except that Class B shareholders get ten votes per share and Class A shareholders get one vote per share. Op. 5. All shares of the Class B stock, about 50.4% of the common stock voting power, are owned by Sunstein, Sarabhai, and their families. Op. 5.

By 2011, Sunstein and Sarabhai became disenchanted with BTRta's publically traded status, which made it difficult for them to operate the business as they wished, and they eventually decided to sell BTRta and their equity interest. Op. 7-8. In September of 2011, CFI presented a merger proposal to BTRta and offered an initial price of $16.50 per share, a premium of about 25% above the market price for BTRta's Class A stock, which had historically traded at $13-$14 per share. Op. 5, 8-9. Sunstein and Sarabhai were very hesitant to recommend or accept this deal due to CFI's past logging practices and its lackluster commitment to sustaining BTRta's environmental practices. Op. 9. In response, CFI raised its offer price to $17 per share and agreed that Sunstein and Sarabhai would stay on as consultants to CFI's Environmental Committee after the merger. Op. 9. On October 17, 2011, the BTRta Board approved the CFI merger agreement. Op. 9. BTRta was required to present the agreement to its shareholders for a vote, but retained the right to terminate the merger agreement if a Superior Proposal was entered into within sixty days following the board's approval of the merger agreement. Op. 10.

Sunstein and Sarabhai continued to express concerns about the environmental practices of CFI and began to investigate a buy-out by Ravert Ward, a private acquisition firm focused on corporate social responsibility. Op. 10. After some intense negotiations, Ravert Ward offered a price of $15.50 per share and a guarantee that BTRta's operations would continue to be managed in the same environmentally sustainable way. Op. 10-11. Ravert Ward absolutely refused to act as a "stalking horse" and therefore: (1) required Sunstein and Sarabhai to execute shareholder voting agreement requiring them to vote all their Class B stock in favor of the merger, and (2) required the BTRta board to submit the proposed deal to the shareholders even if the Board no longer recommended the deal. Op. 11. The BTRta Board met on December 13, 2011, determined that the Ravert Ward deal was a "Superior Proposal" to the CFI deal and approved the merger agreement. Op. 11.

ARGUMENT

I. Article II of the BTRta Certificate of Incorporation is Valid and Enforceable under the Delaware General Corporation Law.

1. Question Presented

Whether Article II of BTRta's Certificate of Incorporation is valid under Delaware law in light of the Revlon doctrine?

2. Scope of Review

The Court reviews the grant or denial of a preliminary injunction for abuse of discretion, but without deference to the legal conclusions of the trial court. SI Mgmt. L.P. v. Wininger, 707 A.2d 37, 40 (Del. 1998). Therefore, because only legal questions are presented on appeal, the standard of review is de novo. Id.

3. Merits of the Argument

The Court must reverse the Court of Chancery's decision below because Article II of the BTRta's Certificate of Incorporation is valid and enforceable under Delaware law. Through Article II, BTRta contracted around Revlon duties to ensure that the BTRta directors could consider "other Stakeholders' interests" rather than just profit maximization in the event of a change of control. Op. 6. Delaware law allows parties to contract around common law duties via provisions in a corporate charter as long as such provisions are not contrary to public policy. Because Revlon duties are a product of common law rather than statutory law, and because Article II is not contrary to public policy, Article II is valid and enforceable.

A. Corporate Charter Provisions Can Contract Around Common Law Duties As Long As the Provisions Do Not Violate Public Policy.

The Delaware General Corporation Law ("DGCL") affords significant discretion to corporations, allowing corporate charters to be the almost exclusive source of law regarding delegation of power to corporate directors. See Jeffrey N. Gordon, Contractual Freedom in Corporate Law: Articles & Comments; The Mandatory Structure of Corporate Law, 89 COLUM. L. REV. 1549, 1552 (1989)(stating that corporate law is meant to "function as a sort of standard form contract, an 'off the rack' set of terms that parties may use for their convenience but may also freely alter"). Accordingly, the DGCL allows corporate charters to include, "any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders . . . if such provisions are not contrary to the laws of this State." 8 Del. C. § 102(b)(1). Therefore, while provisions may not contract around the statutory laws of Delaware, courts have held that "[p]arties can contract around virtually all common law rules." Concord Real Estate CDO 2006-1, Ltd. v. Bank of Am., 996 A.2d 324, 332 (Del. Ch. 2010). The Delaware Supreme Court has stated, "[i]n examining the provisions of a certificate of incorporation, courts apply the rules of contract interpretation." Berlin v. Emerald Partners, 552 A.2d 482, 488 (Del. 1988). Thus, the provisions in a corporation's certificate of incorporation will be read in accordance with contract law principles and will be upheld as valid unless they violate state law provisions or are against public policy. See Sterling v. Mayflower Hotel Corp., 93 A.2d 107, 118 (Del. 1952).

B. The Revlon Duties Are a Common Law Duty That Can Be Contractually Limited.

The Court of Chancery holds that the Revlon Doctrine is a manifestation of the Delaware statutory fiduciary duties, and thus cannot be contracted around. The court analogizes the effects of Article II to the facts in Tri-Star, and states that Article II eliminates the BTRta directors' underlying fiduciary duties. Op. 15. However, the Tri-Star Court chose not to uphold the certificate of incorporation provision because to allow the provision would have been to allow the Tri-Star directors to escape all liability, thus completely contracting around their duty of loyalty. Siegman v. Tri-Star, 1989 Del. Ch. LEXIS 56, at *26 (Del. Ch. 1989). In the present case, the Article II provision does not contract around the directors' fiduciary duties; it merely delineates a sufficient manner by which the directors may carry out their fiduciary duties.

Corporate law is made of up of statutory law created by the legislature and codified into law, and common law, which is a product of the judiciary, as explained in judicial opinions. While the DGCL requires many things of directors under 8 Del. C. § 141, nowhere does it require directors to secure the highest value for shareholders in a change of control transaction. That duty comes from the common law holding of Revlon, which is articulated by this Court in Paramount to mean "[i]n the sale of control context, the directors must focus on one primary objective—to secure the transaction offering the best value reasonably available for the stockholders—and they must exercise their fiduciary duties to further that end." Paramount Commc'ns v. QVC Network, 637 A.2d 34, 44 (Del. 1994).

The Revlon duty to maximize shareholder value is a product of the Delaware judiciary, and therefore is a classic example of common law. It simply interprets a director's statutory obligations to shareholders in a change of control context. Additionally, in Paramount the Court noted that "Both Revlon and the fundamental duty of due care require that the directors establish that their decision was adequately informed." Id. at 1267. Under this reading of Paramount, the Revlon duties are just one particularized application of the directors' duty of care, but not the exclusive or supreme interpretation. The Revlon duties are clearly a creation of common law, not statutory law, and the court below was therefore incorrect in claiming that Revlon duties could not be contractually limited by Article II.

C. Article II Does Not Violate Public Policy as Expressed in the Revlon Doctrine.

The provisions in BTRta's Certificate of Incorporation are aligned with Delaware corporate law and public policy and thus should be upheld by this Court. This Court has stated that "the limits of 'public policy' are ill-defined and changing." Sterling v. Mayflower Hotel Corp., 93 A.2d 107, 118 (Del. 1952). In determining whether BTRta's directors acted against public policy as stated in the Revlon Doctrine, therefore, this Court must examine the motivation and intent behind the Revlon Court's reasoning to identify the policy standard it set forth.

The Revlon Doctrine manifests the Court's longstanding view that directors be well-informed and not be motivated by impermissible factors, such as their own personal interest or gain, in a change of control transaction. The Revlon Doctrine should not be read as a mechanical rule stating that directors must sell to the highest bidder in all circumstances. The doctrine is, rather, a continuation of the core corporate law principle that directors must act in their shareholders' best interests, which is consistent with the purpose of Article II. This view has been confirmed by the courts. Indeed as the Court stated in Barkan v. Amsted Industries, "the basic teaching of these precedents [Unocal and Revlon] is simply that the directors must act in accordance with their fundamental duties of care and loyalty." 567 A.2d 1279, 1286 (Del. 1989). As such, "Revlon is merely one of an unbroken line of cases that seek to prevent the conflicts of interest that arise in the field of mergers and acquisitions by demanding that directors act with scrupulous concern for fairness to shareholders." Id. Because Revlon is just an articulation of general fiduciary duty principles, "there is no single blueprint that a board must follow to fulfill its duties." Id.

With "no single blueprint" to follow, Revlon simply requires directors to act in the best interests of their shareholders in a change of control transaction. Article II is consistent with this objective because it still requires directors to "determine[] what is in the best interests of . . . its stockholders," but simply takes a more environmentally sustainable perspective on what is in the shareholders' best interests. See infra Part D.1. Thus, Article II is consistent with the overall principles of Revlon and does not violate public policy.

D. BTRta Directors Acted In Accordance With Their Fiduciary Duties And Did Not Violate The Revlon Doctrine Principles.

1. Article II Requires Directors to Act in the Best Interest of BTRta Shareholders.

Article II of BTRta's Certificate of Incorporation clearly states that in a change in control transaction, the best value for BTRta shareholders would be a sale based upon a consideration of social and environmental impact, *even if* such a sale resulted in a lower price. Op. 6. Although it is true that, in the majority of change in control transactions, the best value to shareholders is the highest possible price, this is not the case for BTRta shareholders, as these shareholders explicitly agreed to a different valuation.

Plaintiff may argue that not all of BTRta shareholders would want the Board to consider factors other than stock price in a change of control transaction, and thus the directors' actions were not in those shareholders' best interests. However, all stockholders received notice of this provision in the Certificate of Incorporation and Prospectus. Op. 6-7. In Berlin v. Emerald Partners, the Court concluded, "the best evidence of the intention of the parties is often found in the express language of a written contract." 552 A.2d 482, 488 (Del. 1988) (citing 4 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 610 (3d ed. 1961 & Supp.1988). The express language of BTRta's Certificate of Incorporation states that:

> in determining what is in the best interests of . . . its stockholders, a Director shall consider . . . the social, economic, legal, or other effects of any action on . . the communities and society . . . together with the short-term, as well as long-term, interests of its stockholders and the effect . . . on the environment and the economy of those communities and the larger world.

Op. 6. The BTRta shareholders, therefore, explicitly agreed that their best interests would be served in a change of control transaction if the directors considered these alternative factors when deciding upon a sale.

2. Social And Environmental Factor Considerations Are Consistent With Change In Control Transaction Precedent.

The concept that directors may consider social or environmental factors in a change in control transaction is consistent with Delaware precedent. The Revlon Court stated, "while concern for various corporate constituencies is proper when addressing a takeover threat, that principle is limited by the requirement that there be some rationally related benefit accruing to the stockholders." 506 A.2d at 176. Additionally, this Court expounded on directors' duties in the sale of control context in Paramount Communications v. QVC Network, Inc., stating that when directors are choosing among offers, directors may consider non-cash factors, explaining, "[i]n determining which alternative provides the best value for the stockholders, a board of directors is not limited to considering only the amount of cash involved, and is not required to ignore totally its view of the future value of a strategic alliance." 637 A.2d at 44-45 (citing Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1282 (Del. 1989)). The Paramount Court continued, noting:

> Instead, the directors should analyze the entire situation and evaluate in a disciplined manner the consideration being offered . . .the board may assess a variety of practical considerations relating to each alternative including: "an offer's fairness and feasibility; . . . the bidder's identity, prior background and other business venture experiences; and the bidder's business plans for

> the corporation and their effects on stockholder interests."

Id. at 44 (quoting Macmillan, 559 A.2d at 1282). Indeed, Article II allowed the BTRta's directors to consider a "variety of practical considerations," such as Ravert Ward's identity and reputation for corporate social responsibility, and Ravert Ward's plans to continue BTRta's sustainability efforts. Id.

3. The Facts Of The Case At Bar Are Distinguishable From Revlon.

The facts of Revlon are distinguishable from the case at bar to such an extent that a direct application of the Revlon Court's language to the present case is misleading. Although the Court of Chancery focuses on the famous "auction" language from Revlon, that language was merely a restatement of the Court's main holding: in a change in control transaction, directors may not consider non-shareholder interests at the expense of shareholder interests. Revlon, 506 A.2d at 173. The Court of Chancery disregards that the Revlon facts are very different than the case at bar, in that the Revlon Board was motivated by non-shareholder interests that directly conflicted the shareholders' interests in obtaining a high sale price. Id. at 185.

The Revlon directors chose to sell the company to a lower bidder because that bidder agreed to "shore up" the value of notes that had been issued by Revlon directors and subsequently had fallen in value. Id. at 182. The Revlon directors faced the threat of lawsuits from these noteholders, and thus acted in a manner that would protect themselves from litigation. Id. Therefore, the Revlon directors chose between two opposing interests – those of the noteholders and those of the shareholders - and chose the noteholders. In response to the director's choice, the Revlon Court held, "the Revlon board could not make the requisite showing of good faith by preferring the noteholders and ignoring its duty of loyalty to the shareholders". Id. The Court determined that the Board's concern for the noteholders was an impermissible "concern for non-stockholder interests." Id. Revlon's holding, therefore, reflects the Court's desire to ensure that directors carry out their fiduciary duties in a change in control transaction, and do not act to protect themselves or other "non-stockholder interests," at the expense of stockholders. Id.

Article II does not prefer non-stockholder interests over stockholder interests. The BTRta's stockholders, by virtue of holding stock in the company, have expressed an interest in environmental sustainability and the company's environmental practices. Op. 6. Thus, Article II does consider the best interests of the shareholders, and therefore, is consistent with the overarching policy espoused in Revlon.

II. The Deal Protection Devices Adopted by the BTRta Board Are Valid and Enforceable.

1. Question Presented

Whether the challenged deal protection devices, which were adopted by the BTRta board in good faith, with reasonable care, and without conflict, are valid and enforceable.

2. Scope of Review

The Court reviews the grant or denial of a preliminary injunction for abuse of discretion, but without deference to the legal conclusions of the trial court. SI Mgmt. L.P. v. Wininger, 707 A.2d 37, 40 (Del. 1998). Therefore, because only legal questions are presented on appeal, the standard of review is de novo. Id.

3. Merits of the Argument

The Plaintiff asks the Court to enjoin the Ravert Ward merger because it incorrectly believes that the deal protection devices associated with the merger agreement are invalid and unenforceable under Omnicare. Op. 2, 16. The Omnicare decision should not be dispositive on this claim, however, because the three-Justice majority holding in Omnicare is incorrect and must be overturned. When the Court correctly applies Delaware law to review the deal protections at issue, it is clear that the BTRta board satisfied Delaware's fiduciary requirements, and that the deal protections are valid and enforceable.

A. The Business Judgment Rule Precludes the Court from Invalidating the Deal Protection Devices.

1. Delaware Law Requires Deference to Board Decisions When There is No Evidence of Board Impropriety.

Under "normal circumstances," courts defer to the business judgment of directors, and it is only under certain limited circumstances that courts may break from this deferential standard of review to subject board action to higher scrutiny. Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 42 (Del. 1993); see also Omnicare, 818 A.2d at 928. Courts generally exercise such deference to director decisions because they recognize that corporate managers are in a better position than the judiciary to properly weigh all potential factors in reaching decisions on behalf of corporations. See, e.g., Macmillan v. Beran, 765 A.2d 910, 916 (Del. 2000) (citing 8 Del. C. § 141(a); Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985); Aronson v. Lewis, 473 A.2d 805 (Del. 1884)).

Courts may break from this deferential standard of review when there is evidence that the board of directors "breached any one of its 'triad of fiduciary duties[:] loyalty, good faith or due care.'" Macmillan, 765 A.2d at 917; see also Krasner v. Moffett, 826 A.2d 277, 284 (Del. 2003); Aronson, 473 A.2d at 812. However, when directors' decisions are made with due care, in good faith, and without conflict "Delaware law *mandates* deference under the business judgment rule." Omnicare, 818 A.2d at 947 (Steele, J., dissenting) (emphasis added). Because there is no evidence of self-interest or lack of care or good faith by the defendants, Op. 2, the Court must defer to the BTRta Board's decisions under the business judgment rule. See Omnicare, 818 A.2d at 947 (Steele, J., dissenting) ("[T]he absence of a suggestion of self-interest or lack of care compels a court to defer to what is a business judgment that a court is not qualified to second guess.").

2. Deal Protection Devices By Themselves Do Not Evidence Board Self-Interest and Trigger Heightened Scrutiny.

The adoption of deal protection devices does not automatically implicate director self-interest such that the business judgment rule may reflexively be ignored. Deal protective measures may be employed defensively by self-interested directors hoping to avoid a hostile takeover. See, e.g., Paramount, 637 A.2d 31 (Del. 1993); Unocal v. Mesa Petroleum, 493 A.2d 946 (Del. 1985). In such situations, it is appropriate for courts to subject the defensive deal protection tactics to heightened scrutiny rather than defer to the business judgment of the directors "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" in responding to a hostile takeover. Unocal, 493 A.2d at 954. However, the adoption of deal protection measures outside of the context of a hostile takeover, where there is no "specter" of director self-interest or entrenchment, does not warrant the automatic application of heightened scrutiny.

In Omnicare, the three-Justice majority incorrectly applied heightened scrutiny to deal protections because it wrongly conflated "deal protection devices" with "defensive devices." 818 A.2d at 934; see also Sean J. Griffith, The Costs and Benefits of Precommitment: An Appraisal of Omnicare v. NCS Healthcare, 20 J. CORP. L. 569, 588-89 (2004) (noting that the Omnicare majority treated "deal protections" as synonymous with "defensive devices," which automatically triggered enhanced scrutiny "by definition"). The majority justified the application of heightened scrutiny by pointing to the "'omnipresent specter' of director self-interest whenever a board adopts defensive devices to protect a merger agreement." Omnicare, 818 A.2d at 930 (quoting Unocal, 493 A.2d at 954). However, Omnicare involved a friendly merger negotiation where the deal protections were adopted to defend the proposed merger from unwanted interference – not to protect self-interested directors from the threat of being ousted from control. Id. at 924-25; see also Griffith, supra, at 588 (explaining that "[e]ntrenchment was not a possibility" in Omnicare). Accordingly, Omnicare itself illustrates the majority's error in announcing that all deal protection devices are "defensive" and subject to heightened scrutiny.

The Court should rectify Omnicare's error and recognize now that deal protections are not necessarily defensive and do not automatically trigger heightened scrutiny. Consistent with Delaware jurisprudence, heightened scrutiny is only appropriate where deal protections are adopted and there is some indication of director impropriety. Otherwise, the business judgment rule should apply. As Justice Steele explained in his dissent in Omnicare, "When a board agrees rationally, in good faith, without conflict and with reasonable care to include provisions in a contract to preserve a deal...their business judgment should not be second-guessed...to invalidate or declare unenforceable an otherwise valid merger agreement." 818 A.2d at 949 (Steele, J., dissenting).

3. The Court Must Apply the Business Judgment Rule Because The BTRta Directors Acted in Good Faith, Without Conflict, and With Reasonable Care.

Because the BTRta directors acted without conflict, in good faith, and with reasonable care when they adopted the challenged deal protections, the business judgment rule applies. As Chancellor Jeuell noted in her opinion below, "this case does not involve any suggestion of self-dealing on the part of any of the defendants." Op. 2. This lack of self-dealing is first evident in the fact that through the Ravert Ward merger Sunstein and Sarabhai and the other directors will receive the same price per share for their BTRta shares as BTRta's public shareholders. Op. 2. Thus, the directors had the same vested interest as the shareholders in approving the merger deal providing the greatest value. Further, Sunstein and Sarabhai actually stand to personally lose money in the Ravert Ward merger: "While they will both be retained after the [Ravert Ward] merger by the surviving company as consultants, their compensation as such is expected to be less than what they were to receive as consultants following the originally proposed merger with CFI." Op. 2. Accordingly, the BTRta directors' support of the Ravert Ward merger is not motivated by their financial self-interest.

In addition, the BTRta directors acted with reasonable care and in good faith when deciding to adopt the challenged deal protection measures. As a part of its final offer terms, Ravert Ward "insisted" that for any deal to occur: (1) Sunstein and Sarabhai had to execute voting agreements to vote all of their shares in favor of the merger, and (2) the BTRta board was required to present the merger agreement to a vote of its stockholders, even if the board no longer considered the merger desirable. Op. 11-12. After careful deliberation, the BTRta directors reasonably determined that the Ravert Ward merger was a "Superior Proposal" to the CFI merger, and that in order to secure this superior deal for the corporation and its shareholders it must comply with the above demands – a reasonable conclusion given Ravert Ward's insistence. Op. 11-12. Thus, the BTRta board exercised reasonable care and good faith in adopting the challenged deal protections to secure Ravert Ward's Superior Proposal. Because the BTRta board acted without conflict, in good faith, and with reasonable care when adopting the challenged deal protections, the business judgment rule applies. See Omnicare, 818 A.2d at 948 (Steele, J., dissenting) (noting that where a board acts with due care, in good faith, and without conflict, resulting decisions "cannot be second guessed by courts with no business expertise").

B. Even Under Unocal's Heightened Scrutiny Test the Challenged Deal Protections are Still Valid and Enforceable.

Even if the Court wrongly ignores the business judgment rule to subject the BTRta board's actions to heightened judicial scrutiny, the challenged deal protections are still valid and enforceable. Unocal's enhanced scrutiny test requires directors to show two things: (1) "that they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed"; and (2) that their defensive response "was reasonable in relation to the threat posed." Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) (citations omitted). When Delaware law is correctly applied it is clear that the BTRta directors satisfied both parts of this test, and therefore survive even heightened Unocal scrutiny.

1. The BTRta Board Reasonably Perceived a Threat to Corporate Policy and Effectiveness.

The BTRta directors had a reasonable basis for concluding that failing to ensure the Ravert Ward merger would result in a danger to corporate policy and effectiveness. Specifically, the BTRta board was very concerned about the continuation of BTRta's environmentally responsible practices, which represented an important part of BTRta's culture and existence. Op. 6-7. Because of "the size of CFI's operations, and its history of logging practices," the BTRta board reasonably determined that a merger with CFI may detrimentally affect BTRta's environmentalist culture and policies. Op. 9. It was this potential threat to BTRta's environmental policies that motivated the board to seek and secure a "Superior Proposal" from Ravert Ward, which has a much better reputation for social responsibility than CFI. Op. 10-13. Thus, the record shows that the first part of Unocal's heightened scrutiny test is satisfied because there were reasonable grounds for the BTRta directors to believe that failing to secure the "Superior Proposal" from Ravert Ward represented a danger to BTRta's corporate policy and effectiveness.

2. The BTRta Board's Reasonably Responded to the Threat.

The second part of Unocal's heightened scrutiny test is also satisfied because the BTRta board's response to the perceived threat was reasonable. A response is reasonable in relation to the threat when it (1) is not draconian, or not "coercive or preclusive," and (2) is within the range of reasonableness. Omnicare, 818 A.2d at 935 (citing Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1387–88 (Del. 1995)). Both elements of this test are satisfied here.

a) The Court Must Only Assess the Reasonableness of the Board's Must-Submit Covenant.

Before demonstrating that the BTRta board's response satisfies this two-part reasonableness test it is important to emphasize that under a proper application of Delaware law the Court must only assess the reasonableness of defensive measures unilaterally adopted by the BTRta board. See Williams v. Geier, 671 A.2d 1368 (Del. 1996); Stroud v. Grace, 606 A.2d 75 (Del. 1992). In Williams v. Geier, the Court refused to apply Unocal scrutiny to a defensive recapitalization plan because a majority of shareholders had approved the plan. 671 A.2d 1368. Enhanced scrutiny was not appropriate, the Court noted, because "Unocal analysis should be used only when a board *unilaterally* (i.e., without stockholder approval) adopts defensive measures." Id. at 1377 (emphasis added). Because the shareholders approved the recapitalization, there was no unilateral defensive action by the board to be subjected to Unocal scrutiny. Id.; see also Stroud, 606 A.2d at 92 (declining to apply heightened scrutiny to review the adoption of charter amendments ratified by a majority of shareholders because "the factual predicate of unilateral board action" was "completely absent"). Accordingly, under Williams and Stroud the Court must only consider the reasonableness of the actions the BTRta board took unilaterally–namely, the adoption of the must-submit covenant.

The Court should not consider the reasonableness of the majority shareholder agreements executed by Sunstein and Sarabhai because those agreements were the result of shareholder – not board – action. The fact that these shareholders were also directors does not equate to the actions being those of directors. The agreements required Sunstein and Sarabhai to vote their shares of Class B common stock *in their capacity as shareholders*, and Delaware cases have noted that shareholder-directors can act in their independent shareholder capacity. See, e.g., H-M Wexford, LLC v. Encorp, 832 A.2d 129 (Del. Ch. 2003); Grimes v. Donald, 1995 WL 5441, at *9 (Del. Ch. 1995). Consequently, when considering the reasonableness of the BTRta board's response to the threat to corporate policy and effectiveness, the Court should distinguish the shareholders' voting agreements from the board's must-submit covenant, and only consider the latter.

In Omnicare, the majority incorrectly considered the reasonableness of both the board's must-submit covenant and the shareholder voting agreements together. 818 A.2d at 934. To explain this complete rejection of the precedential value of Williams and Stroud the majority stated that neither case held that enhanced scrutiny could not be applied to "a comprehensive and combined merger defense plan." Id. at 934. Thus, the apparent rationale for considering non-board action when determining if a board's response to a perceived threat was reasonable was that the Court had never before said that such consideration was not allowed. Id. This rationale is clearly unsatisfactory, and fails to distinguish the well-recognized reasoning underlying the Williams and Stroud holdings from the situation at hand in Omnicare. As such, the Court should acknowledge the error of the Omnicare majority in this regard and once again recognize that when applying Unocal, courts should only consider the unilateral defensive actions of the board.

b) The Must-Submit Covenant Was a Reasonable Response to the Threat Perceived.

When the must-submit covenant is viewed in isolation, it clearly passes scrutiny under Unocal because it has no preclusive or coercive effect, and is well within the range of reasonableness. Preclusive measures restrict the target shareholders from receiving other offers, and coercive measures force shareholders to acquiesce to a proposed merger. See Omnicare, 818 A.2d at 935. The must-submit covenant alone is absolutely powerless to prevent other bids, and in no way forces the shareholders to vote in favor of the merger. Therefore, the must-submit covenant does not constitute a preclusive or coercive measure and it passes the first part of Unocal's reasonableness scrutiny.

Further, adopting the must-submit covenant was necessary in order for the BTRta board to ensure Ravert Ward's Superior Proposal, and thus ensure BTRta's continued commitment to environmentally responsible practices. Op. 11-12. Accordingly, this response was not only "within the range of reasonableness" to address the perceived threat, it was the only possible response for the board. See Omnicare, 818 A.2d at 945 (Veasey, C.J., dissenting) (noting that the NCS directors' response "was reasonable in relation to the threat" because the deal protections adopted "were necessary to obtain the Gensis deal"); see also Thompson v. Enstar Corp., 509 A.2d 578, 584 (Del. Ch. 1984) ("The adoption of the lock-up provisions was a necessary prerequisite to [the acquirer] making its tender offer and therefore it is probable it was reasonable for the directors to accede to [the acquirer's] demand."). Accordingly, even if the Court chooses to apply Unocal analysis to the BTRta board's non-defensive deal protections, when the Court properly considers the board's must-submit covenant in isolation it is obvious that it will pass Unocal scrutiny.

3. The Lack of a Fiduciary Out Does Not Make the BTRta Board's Response Per Se Unreasonable.

That the BTRta board did not negotiate a "fiduciary out" clause in the Ravert Ward merger agreement does not make the board's actions per se unreasonable. In Omnicare the majority held that it is per se unreasonable under Unocal's enhanced scrutiny when a board "locks up" a merger agreement but does not include a fiduciary out clause. Omnicare, 818 A.2 at 938. This per se rule is supported neither by Delaware jurisprudence nor common sense, and must be overturned by the Court. See Id. at 945 (Veasey, C.J., dissenting) ("We know of no authority in our jurisprudence supporting this new rule, and we believe it is unwise and unwarranted.").

Omnicare's fiduciary out requirement is flawed because it prevents parties from ever completely locking up a potential transaction, which in many situations – such as the present case – is a completely reasonable response to the circumstances. Id. at 942 (Veasey, C.J., dissenting) ("Situations will arise where business realities demand a lock-up so that wealth-enhancing transactions may go forward."). A lock-up provides bidders with certainty, which is a "[v]aluable [t]rading [c]ommodity." Id. Without the certainty provided by a lock-up an acquirer "will simply discount its bid to reflect its uncertainty concerning target's commitment," or "will not bid at all." Eleonora Gerasimchuk, Stretching the Limits of Deal Protection Devices: From Omnicare to Wachovia, 15 FORDHAM J. CORP. & FIN. L. 685, 704 (2010). Thus, where certainty for the acquirer is important or necessary, the Omnicare fiduciary out requirement detrimentally affects shareholder wealth maximization and efficiency.

The present suit is a perfect example of how Omnicare's per se fiduciary out requirement is inappropriate. Ravert Ward made it absolutely clear that it was only willing to negotiate a possible deal with BTRta on the condition that it would not be a "stalking horse." Op. 11-12. As a result, including a fiduciary out clause would have been unacceptable to Ravert Ward, and insisting on such a clause would likely have resulted in BTRta losing a Superior Proposal for its shareholders. Thus, in this particular circumstance, not including a fiduciary out in the Ravert Ward merger agreement was reasonable, illustrating the error in the Omnicare majority's pronouncement that failing to include a fiduciary out is per se unreasonable. Because the per se fiduciary out requirement is incorrect, and because the BTRta board's decision to lock up the Ravert Ward deal was reasonable under the circumstances, the BTRta board satisfies the second part of Unocal's heightened scrutiny. Therefore, the Court must hold that the deal protections are valid and enforceable even if heightened scrutiny is incorrectly applied.

CONCLUSION

For the forgoing reasons, Appellants ask the Court to REVERSE the decision of the Court of Chancery, and recognize the validity of Article II and the challenged deal protections.

Respectfully submitted,

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February 10, 2012