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 ACQUISTION CORP.,	)	No. 142, 2012
Defendants Below, Appellants,	)	
v.	)	
CONSOLIDATED FOREST INDUSTRIES CO., a Delaware corporation,	)	Court Below: Court of Chancery of the State of Delaware in and for New Castle County Civil Action No. 6943-CJ
Plaintiff Below, Appellee,	)	

Opening Brief For the Appellants

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NATURE OF PROCEEDINGS

This is an appeal from the entry of the January 23, 2012 Order in the Court of Chancery, written by Chancellor Meghan Jeuell. The Court of Chancery issued a 17-page memorandum opinion ("Op."). Defendants Below-Appellants, BTRta Forest Products, Inc. ("BTRta") and members of its board of directors (collectively, the "BTRta Defendants"), applied for interlocutory appeal pursuant to Supreme Court Rule 42 on January 31, 2012, and the appeal was granted by this Court on the 10th of February.

On appeal, the BTRta Defendants assert that the Court of Chancery incorrectly ruled in favor of the Plaintiff Below-Appellee, Consolidated Forest Industries Co. ("CFI") when it issued a preliminary injunction, in Civil Action No. 6943-CJ, against the consummation of the merger between BTRta and Ravert Ward L.P. The BTRta Defendants argue that the Court of Chancery incorrectly determined that Article II of BTRta's certificate of incorporation violated Delaware Law. The BTRta Defendants also challenge CFI's assertion that Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914 (Del. 2003), should invalidate the agreements that BTRta and Ravert Ward entered into in order to ensure the consummation of their "Superior" deal. The BTRta Defendants believe that this case presents a ripe opportunity for this Court to overrule its Omnicare precedent.

This is the appellants' brief in support of their appeal.

SUMMARY OF ARGUMENT

1. The Court of Chancery incorrectly issued the preliminary injunction against the consummation of the merger between BTRta and Ravert Ward. Article II of BTRta's certificate of incorporation is a proper invocation of the Section 102(b)(1) right to define the powers of the corporation and its board of directors. Article II does not offend any Delaware statutory law. Further, shareholders freely consented to the modification of the board of directors' Revlon duties by purchasing stock after being put on notice of the practical import of the provision. Thus, BTRta's board of directors' adherence to Article II when it selected the Ravert Ward merger proposal over the CFI proposal did not constitute a breach of any fiduciary duties.

2. The Court should use this case to overrule its Omnicare decision. The Omnicare Court incorrectly determined that deal protection measures should be invalidated when they involve:

   a. A board of directors' agreement to put a merger proposal to a vote, regardless of their support of the proposal, and

   b. An agreement by the board members, who own a majority voting power, acting in their capacity as shareholders, to vote their shares in support of the proposal.

   If there is no self-dealing by the board members that control the majority of the voting power, and the board of directors is made up of a majority of independent directors, then the board's decision to invoke such deal protection devices should be evaluated under the business judgment rule. However, these deal protection devices

should still withstand enhanced judicial scrutiny, in the absence of any self-dealing.

STATEMENT OF THE FACTS

A. The Parties

Defendants-Below, Appellants

BTRta Forest Products, Inc

BTRta is a Delaware Corporation, Op. at 2, and has its principal place of business in Portland, Maine. Op. at 4. BTRta produces specialty papers and chemicals and sustainably harvested lumber. Id. BTRta was founded in 1987. Op. at 5. As of December 31, 2011, BTRta had 25,267,042 shares of Class A common stock and 2,567,304 shares of Class B common stock outstanding. Id. Since 2000, the Class A stock is publicly traded on the Nasdaq Stock Market. Id. Class A and Class B stockholders enjoy the same rights and generally vote as a single class, but Class B stockholders receive ten votes for every one vote Class A stockholders receive. Id.

BTRta Co-Founders and Chief Executives

Matthew Sunstein and Vikram Sarabhai are the co-founders and co-chief executive officers of BTRta. Op. at 4. Sunstein and Sarabhai are the only two non-independent members of BTRta's board of directors. Id. In combination with their respective family members, the two own all of BTRta's Class B stock. Op. at 5. Thus, Sunstein

and Sarabhai represent 50.4% of the voting power among BTRta's shareholders and 9.2% of the outstanding shares of the company. Op. at 5-6.

BTRta Independent Board of Directors

Michael F. Allen, Miles D. Liu, Kathleen L. Todman, Janice L. Stern, Herbert P. McCusker, Paula R. Abazian and William D. Hemphill are the independent members of BTRta's board of directors. Op. at 4. They collectively own 2,154,687 shares (8.5%) of BTRta's Class A common stock. Id.

Ravert Ward L.P. and BTR Acquisition Corp.

Ravert Ward is a Massachusetts-based boutique acquisition firm that privately acquires smaller, socially responsible corporations. Op. at 4, 10. BTR Acquisition Corp. is the company Ravert Ward created to consummate the BTRta acquisition. Op. at 4.

Plaintiff-below, Appellee

Consolidated Forest Industries Co. ("CFI")

CFI is a Delaware corporation with headquarters in Boise, Idaho. Op. at 3. CFI is the world's largest producer of paper and wood products. Id. CFI currently owns just 4,300 shares (0.00015%) of BTRta's common stock. Op. at 2.

B. Factual background

Sunstein and Sarabhai created BTṚta with the primary goal of manufacturing and selling forest products using sustainably harvested trees and otherwise minimizing the adverse environmental impact of production. Op. at 4. BTṚta's commitment to the environment and the communities with whom the company interacts is reflected in what is now Article II of BTṚta's certificate of incorporation. Op. at 6.

Adopted in 1997, prior to BTṚta seeking its first round of venture capital funding, Article II instructs BTṚta's directors to make all decisions with the "best interests" of the company in mind. Op. at 6-7. Article II defines the company's "best interests" as a balancing between the short-term and long-term prospects and interests of the Company and its shareholders with the impact of any board decision on the company's current and retired employees, suppliers, customers, the local communities in which the company operates, the global community and the environment. Op. at 6. Article II explicitly gives the board of directors the power to conduct this "best interests" balancing even in the context of a Change in Control transaction. Id. Another provision of the certificate of incorporation defines "Change in Control" transactions to include a merger in which the company's stock is converted into the right to receive cash. Id.

BTṚta and its management put investors on notice about the practical impact of Article II by including a "Risk Factors" section

in the prospectus accompanying BTRta's 2000 initial public offering of Class A common stock. Op. at 7. In that section, the company stated that Article II may lead the board of directors to accept an offer resulting in a lower price per share in an all cash sale of the company if the board of directors decides that the deal is in the "best interests" of the shareholders and other relevant stakeholders. Id.

In April of 2011, Sunstein and Surabhai informed BTRta's board of directors about their dissatisfaction with running BTRta as a publicly traded company. Id. At the behest of the board of directors, Sunstein and Surabhai discussed potential transactions with outside financial advisor, Eberhard Jefferson L.P. ("Eberhard"). Op. at 8. Eberhard recommended that the two co-founders divest of their ownership control by selling all of their Class B common stock. Id. Sunstein and Surabhai presented this plan to the independent board directors on May 18, 2011. Id. The independent board members pushed back and insisted on a sale of BTRta's entire equity. Id. At the time the Class A common stock was trading between $13 and $14 per share. Op. at 5.

BTRta used Eberhard to solicit bids for a potential buyer of the company, and in September 2011 CFI became the first interested acquirer. Op. at 8. CFI made an initial bid of $16.50 per share. Op. at 8-9. However, Sunstein and Surabhai were concerned about CFI's past logging practices and negotiated an increase to $17 per share along with assurances that CFI would maintain BTRta's sustainable

logging practices. Op. at 9. CFI agreed to retain Sunstein and Surabhai as paid consultants to further this goal. Id.

CFI and BTRta entered into a merger agreement, which was approved by BTRta's board of directors. Id. However, the merger agreement contained a provision that gave BTRta a 60-day window to consider "Superior Proposals" defined as a proposal that is more consistent with the "best interests" definition in Article II of BTRta's certificate of incorporation. Op. at 10.

Within the agreed upon 60-day window, Eberhard introduced Sunstein and Surabhai to the principals of Ravert Ward L.P. Ravert Ward is a private-equity firm with a track record of private acquisitions of socially responsible companies. Id. After initial talks, Ravert Ward presented an offer for $13 per share. Op. at 11. Sunstein and Surabhai rejected that inadequate offer. Id. However, as the 60-day period was about to close, Ravert Ward came back to the table with an offer of $15.50 per share and assurances that the company would remain committed to environmentally responsible practices. Id.

Ravert Ward conditioned its offer on BTRta agreeing to forego shopping for any other superior offers. Op. at 12. The BTRta board of directors had to agree to present the merger agreement for a stockholder vote as soon as practicable, even if the board no longer considered the Ravert Ward merger desirable. Id. This action was combined with a commitment from Sunstein and Surabhai that they would

execute, in their capacity as shareholders, agreements to vote all of their shares of Class B stock in favor of the merger. Id.

On December 13, 2011 the BTRta board of directors deliberated about whether the Ravert Ward deal was a "Superior Proposal." Id. The board of directors determined that the premium price that Ravert Ward was willing to pay for the company and Ravert Ward's substantially more certain commitment to social responsibility outweighed the benefits of going forward with the CFI deal. Id. The board of directors approved the Ravert Ward merger agreement with the deal protection provisions. Id. Following the board meeting, Sunstein and Surabhai executed the voting agreements. Id.

After finalizing the Ravert Ward deal, BTRta canceled its deal with CFI. Op. at 13. CFI responded by bringing this lawsuit. Id.

ARGUMENT

I. THE COURT OF CHANCERY ERRED WHEN IT ENJOINED THE RAVERT WARD MERGER ON THE GROUNDS THAT ARTICLE II OF BTRTA'S CERTIFICATE OF INCORPORATION IS CONTRARY TO THE LAWS OF THE STATE OF DELAWARE.

A. Question Presented

Did the Court of Chancery err when it enjoined the Ravert Ward merger on the grounds that Article II of BTRta's certificate of incorporation is contrary to the laws of the State of Delaware?

B. Scope of Review

The Supreme Court reviews grants or denials of preliminary injunctions by the trial court for abuse of discretion, but review is conducted without deference to embedded legal conclusions of the trial court. Kaiser Aluminum Corp. v. Matheson, 681 A.2d 392 (1996). The Court of Chancery determined that Article II of BTRta's certificate of incorporation violated Delaware Law. Thus, this Court should review that legal conclusion under the *de novo* standard. Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1385 (Del. 1995).

C. Merits of Argument

i. Article II of BTRta's Certificate of Incorporation Is a Contract Between the Corporation and Its Shareholders that Does Not Violate Delaware Statutory Law.

Section 102(b)(1) of the Delaware General Corporations Law expressly states that a corporation's certificate of incorporation may contain "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." Del. Code tit. 8, §102(b)(1). The Delaware Supreme Court held that the phrase "laws of this State" does not include common law provisions. See Sterling v. Mayflower Hotel Corp., 93 A.2d 107, 118 (Del. 1952) ("We are unwilling to assent to plaintiffs' contention that all the rules of the common law applicable to corporations are brought within the sweep of the phrase 'laws of this State.'").

Further, this Court has held that parties can displace rules of common law by contractual agreement. See Ingres Corp. v. CA, Inc., 8 A.3d 1143, 1146 (Del. 2010). It is well-settled Delaware law that corporate charters are contracts that bind the corporation and its shareholders. See Centaur Partners, IV v. Nat'l Intergroup, Inc., 582 A.2d 923, 928 (Del. 1990). Thus, a corporation and its shareholders can contractually agree, in the corporation's charter, to deviate from the rules of the common law. See Sterling, 93 A.2d at 118. The only limitation on that contract right is that the charter provision cannot violate statutory law or offend public policy. Id.

The Court of Chancery erred when it relied on the standard announced in Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986), to invalidate Article II of BTRta's certificate of incorporation. Revlon announced the common law duties required of a board of directors that is evaluating merger proposals when the sale of the corporation is a forgone conclusion. However, BTRta properly exercised its right, pursuant to Section 102(b)(1), to modify those common law duties in its certificate of incorporation.

The BTRta shareholders ratified the waiving of the Revlon duties when they purchased stock in BTRta with knowledge of Article II's practical impact. The Risk Factors section in BTRta's Class A common stock initial public offering prospectus indicated how Article II would affect the way BTRta's board of directors would evaluate competing proposals for Change of Control transactions. Therefore, shareholders were on notice that the "best interests" of the

corporation required a balancing of maximizing shareholder value with considerations of other stakeholders' interests. BTRta's shareholders bought the company's stock knowing that they would be contractually bound by Article II. Thus, BTRta's shareholders implicitly agreed that considering other stakeholder's interests would be in the "best interests" of themselves as shareholders; otherwise the shareholders would not have invested in BTRta.

CFI is one of BTRta's shareholders that agreed to be bound by Article II when it purchased BTRTA's stock. CFI's acceptance of Article II is further evidenced by the "Superior Proposal" provision in its merger agreement with BTRta. The "Superior Proposal" explicitly countenanced BTRta's board of director's duty to use Article II to guide its decision as to what merger proposal to recommend to shareholders. CFI is now strangely trying to invalidate a provision that it has agreed to both as a shareholder and as a counterparty to a merger agreement.

ii. Article II Is Valid Because BTRTA Did Not Violate Its Duty of Loyalty by Adhering to the Terms of Article II.

Article II is a valid modification of a common law rule, and thus should be upheld unless it violates Delaware statutory law. See Sterling, 93 A.2d at 118. One statutory limitation is the prohibition against companies drafting provisions to shield their directors from facing liability for violations of the duty of loyalty. Del. Code tit. 8, § 102(b)(7). The duty of loyalty "mandates that the best interest of the corporation and its shareholders takes precedence over

any interest possessed by a director . . . and not shared by the stockholders generally." Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993). To establish a breach of duty of loyalty, CFI must show that the directors were on both sides of the transaction or received a personal benefit that was unavailable to the corporation or the shareholders. Id. at 363 (citations omitted). This burden is harder to overcome when a majority of independent board of directors approved the challenged action. See Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1168 (Del. 1995) (Duty of loyalty was not breached because a large majority of the board was independent and the two directors assumed to be interested did not dominate or manipulate the vote).

The Court of Chancery erred in finding that this case was factually similar to the Revlon and Siegman v. Tri-Star Pictures, Inc., 15 Del. J. Corp. L. 218 (1989), cases in which the courts found that the boards of directors violated their duties of loyalty. In Revlon, the directors violated their duty of loyalty by securing a deal that placed the interests of the company's noteholders over the interests of its shareholders, in an effort to shield themselves from being sued by the noteholders. 506 A.2d at 182, 184. Similarly, Tri-Star involved a merger agreement that included a provision permitting directors to usurp corporate opportunities, which could cause the corporation financial harm. 15 Del. J. Corp. L. at 231. The Revlon and Tri-Star cases represent textbook examples of breaches of the duty of loyalty. See Stone ex rel. AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006) (Duty of loyalty violated when directors are

engaged in self-dealing, or when they act in a manner that is not in the corporation's best interest).

In contrast, the Court of Chancery acknowledged that the BTRta directors did not engage in any self-dealing. Op. at 2. The directors chose the Ravert Ward deal because it was in the best interest of the corporation, as defined by Article II, even though the CFI deal promised a higher stock price and a higher consulting salary for Sunstein and Sarabhai. The unanimous approval of the Ravert Ward deal by the seven independent directors further negates any hint of self-interest.

Additionally, Article II does not permit the BTRta directors to usurp corporate opportunities. All of the directors, including Sunstein and Sarabhai, were shareholders who stood to receive the same price per share as the rest of the company's shareholders.

Article II urges directors to "consider the long-term prospects and interests of the Company and its stockholders," and the social, economic, and legal or other effects the corporation's actions may have on its employees, suppliers, customers, and the communities in which the corporation operates. Op. at 6. It does not exculpate BTRta's directors from facing liability for violations of their duty of loyalty, nor does Article II force directors to violate this duty. Article II does not compel BTRta's directors to act in a manner that is contrary to the best interests of the corporation and its shareholders. In fact, Article II presents an agreed upon definition

that the best interests of BTRta and its shareholders includes the promotion of corporate social responsibility and environmentalism, and this Court should give effect to that intent. See Waggoner v. Laster, 581 A.2d 1127, 1134 (Del. 1990) ("A certificate of incorporation is viewed as a contract among shareholders, and . . . courts must give effect to the intent of the parties as revealed by the language of the certificate and the circumstances surrounding its creation and adoption.").

iii. Article II Is Valid Because BTRTA Did Not Violate Its Duty of Care by Adhering to the Terms of Article II.

The Court of Chancery also erred in finding that Article II forced BTRta's directors to violate their duty of care. "The duty of care requires a director, when making a business decision, to proceed with a critical eye by acting in an informed and deliberate manner respecting the corporate merits of an issue before the board." Ivanhoe Partners v. Newmont Min. Corp., 535 A.2d 1334, 1345 (Del. 1987). "In making business decisions, directors must consider all material information reasonably available, and that the directors' process is actionable only if grossly negligent." Brehm v. Eisner, 746 A.2d 244, 259 (Del. 2000). Directors meet this grossly negligent standard only if they fail to consider all material facts reasonably available or act in a manner that cannot be attributed to a rational business purpose. Id. at 264 n.66.

Article II does not controvert the duty of care; in fact, it compels directors to make informed and deliberate decisions by requiring them to consider a myriad of factors, including:

> the long-term prospects and interests of the company and its stockholders, and the social, economic, legal, or other effects of any action on the current and retired employees, the suppliers and customers of the Company or its subsidiaries, and the communities and society in which the Company or its subsidiaries operate . . . together with the short-term, as well as long-term, interests of its stockholders and the effect of the Company's operations . . .on the environment and the economy of those communities and the larger world.

Op. at 6. BTRTA's directors fulfilled this requirement by proceeding with the Change of Control transaction very carefully, and remaining informed throughout the process. After disclosing their desire to sell the corporation to the rest of the board, Sunstein and Surabhai discussed potential transactions with outside financial advisor, Eberhard, and consulted with them throughout the process. The directors negotiated with both CFI and Ravert Ward to achieve improved terms than the terms the companies initially offered. Eventually, they were able to secure a deal that resulted in shareholders receiving a price per share $1.50-$2.50 higher than the market value of their stock, while satisfying BTRta's environmental mandates. These actions are far more thorough than the actions of boards that have violated the duty of care. Cf. McMullin v. Beran, 765 A.2d 910, 922 (Del. 2000) (Board breached their duty of care by approving transaction without informing themselves about the transaction or determining whether merger consideration equaled or exceeded the corporation's market value).

The Court of Chancery also found that Section 102 (b)(7), and Revlon, implicitly prohibit a corporation to promote broader societal interests at the expense of stockholder's interests. That assertion

is contrary to Delaware statutory law, which permits corporations to promote broader societal interests in the form of donations. See Del. Code tit. 8, § 122 (9). Some may argue that when a board of directors chooses to make a donation instead of issuing dividends, the directors place charitable interests over the shareholders interests. Yet, corporate donations are often upheld, so long as they are reasonable. Kahn v. Sullivan, 594 A.2d 48, 61 (Del. 1991) ("§ 122(9) places no limitations on the size of a charitable corporate gift, that section has been construed 'to authorize any reasonable corporate gift of a charitable or educational nature.'")(citation omitted).

Although this case involves the sale of a corporation, and not a donation, Section 122 (9) and Kahn show that a corporation's concern for broad societal interests is not ultra vires. This Court should recognize that corporate social responsibility and environmentalism are values that concern many shareholders. If those shareholders purchase stock in a company, like BTRta, which explicitly incorporates those values in their certificate of incorporation, this Court should uphold that judgment.

In sum, Article II is valid because it does not compel directors to violate the duty of loyalty or the duty of care. Article II does not force directors to self-deal or act contrary to the interests of the corporation; in fact, it ensures directors will make informed decisions. Article II is permissible under Section 102(b)(1) and it does not violate Section 102(b)(7). Therefore, this Court should

reverse the Court of Chancery's decision to enjoin the BTRta and Ravert Ward merger.

II. THE HOLDING OF OMNICARE SHOULD BE OVERRULED.

A. Question Presented

Should the holding of Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914 (Del. 2003), be overruled?

B. Scope of Review

The Court of Chancery declined to consider the Appellants argument that Omnicare should be overruled. "[W]hether claims are barred from consideration under the doctrine of *stare decisis* presents a question of law that is subject to *de novo* review." Account v. Hilton Hotels Corp., 780 A.2d 245, 248 (Del. 2001). A court clearly has the authority, indeed the responsibility, to overrule its own common law decisions when they lose their legal vitality. Travelers Indem. Co. v. Lake, 594 A.2d 38, 46 (Del. 1991).

C. Merits of Argument

While *stare decisis* promotes the values of continuity and predictability, "precedents, over time, may lose their acceptability and a case wrongly decided at the inception should not preclude reconsideration." Keeler v. Harford Mut. Ins. Co., 672 A.2d 1012, 1017 (Del. 1996).

Omnicare was wrongly decided at its inception, and thus should be overruled. The Omnicare Court incorrectly applied enhanced scrutiny

to review the deal protection measures employed by NCS and Genesis when the business judgment rule was the appropriate standard to use.

i. Omnicare Should Be Overruled Because the Business Judgment Rule Is the Appropriate Standard of Review for Informed Board Decisions Made in Good Faith.

The majority's decision in Omnicare runs counter to the well-established common law rule that the court should refrain from imposing itself unreasonably on business and affairs of a corporation. See Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993). The business judgment rule presumes 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 was in the best interest of the company [and its shareholders]." Emerald Partners v. Berlin, 787 A.2d 85, 90 (Del. 2001). Courts may break from this deferential standard of review only when directors act under a conflict of interest with the corporation or its shareholders. See MM Companies v. Liquid Audio, Inc., 813 A.2d 1118, 1120 (Del. 2003).

An application of the traditional business judgment rule places the burden on the "party challenging the [board's] decision to establish facts rebutting the presumption." Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1373 (Del. 1995) (quoting Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)). Under a proper invocation of the business judgment rule, "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.'" Unitrin, 651 A.2d at 1373 (quoting Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985)).

In Omnicare, the Court incorrectly held that the NCS board of directors acted under a conflict of interest because the defensive devices in the Genesis merger agreement acted to prevent stockholders from effectively exercising their right to vote contrary to the board's desire to protect the merger agreement. 818 A.2d at 930. The Court stated that whenever a board of directors employs defensive measures to protect a deal, the "omnipresent specter" of the board of directors' conflict of interest arises. Id. (citing Unocal Corp v. Mesa Petroleum Co., 493 A.2d at 954). However, as Chief Justice Veasey's dissenting opinion makes clear the Unocal court was concerned about a specific conflict of interest; the board's self-interest to entrench itself in office. Omnicare, 818 A.2d at 943 n.102 (Veasey, J., dissenting) (citing Unocal, 493 A.2d at 954). As Justice Steele's dissenting opinion observed, "[t]he contract terms that NCS's board agreed to [with Genesis] included no insidious, camouflaged side deals for the directors or the majority stockholders nor transparent provisions for entrenchment or control premiums." Omnicare, 818 A.2d at 948 (Steele, J., dissenting). Yet, the majority of the Omnicare Court still determined that the deal protection devices employed by NCS and Genesis required an enhanced scrutiny analysis. 818 A.2d at 934.

Like Omnicare, the case before this Court involves no specter of self-dealing on the part of the BTRTA's board of directors. The Court of Chancery's findings of fact make it clear that BTRTA's board of directors, especially Sunstein and Sarabhai, had less financial

incentive to approve the Ravert Ward deal than the CFI deal. The BTRTA board of directors protected the Ravert Ward deal based on their desire to secure the deal that best represented the ideals the corporation and its shareholders espoused in Article II of the certificate of incorporation.

In Chief Justice Veasey's Omnicare dissent, he explained how deal protection measures in a merger agreement represent an "exchange of certainties." 818 A.2d at 942 (Veasey, J., dissenting). In Omnicare, the deal protection devices employed by NCS secured the only merger deal that was on the table that guaranteed stockholders and creditors would receive value. Id. at 944. Similarly, the BTRTA board of directors determined that the Ravert Ward deal provided the greatest certainty that the corporation's concerns about corporate responsibility and environmentalism would be protected. Thus, this Court should give deference to the board of directors' business judgment.

ii. Omnicare Should Be Overruled Because the Court Incorrectly Held that Defensive Devices Require Enhanced Scrutiny Even in the Absence of Self-Dealing.

a. The Defensive Devices Invalidated in Omnicare Are Not Preclusive or Coercive Because They Represent a Joint Approval of the Board and Controlling Shareholders.

The majority's decision in Omnicare does not reflect the accepted principle that joint action of the stockholders and directors represents the highest and best form of corporate democracy and should not be subject to a Unocal analysis. Williams v. Greier, 671 A.2d 1368, 1381 (Del. 1996). The Unocal Corp. v. Mesa Petroleum Co., 493

A.2d 946 (Del. 1985), standard is applicable where the board "adopts any defensive measure taken in response to some threat to corporate policy and effectiveness which touches upon issues of control." Gilbert v. El Paso Co., 575 A.2d 1131, 1144 (Del. 1990). In order to survive the Unocal standard of review, the directors must show: (1) They acted in good faith after a reasonable investigation and concluded they had reasonable grounds for believing a danger to corporate policy and effectiveness existed; and (2) The defensive measure was reasonable in relation to the threat posed. Unocal, 493 A.2d at 955-56. The second stage of the Unocal test requires a showing that the merger deal was not coercive or preclusive and that their response was within a "range of reasonable responses" to the threat perceived. Unitrin, 651 A.2d at 1387 (Del. 1995).

The Omnicare Court correctly determined that the lock-up agreement used by NCS's board of directors to secure the Genesis merger offer was a reasonable response to the threat of insolvency that would have resulted absent the Genesis offer. 818 A.2d at 935. BTRTA's board of directors was responding to a similar threat to corporate effectiveness when it agreed to the defensive measures needed to secure the Ravert Ward deal. Without the Ravert Ward deal, BTRTA faced the uncertainty that CFI would not honor its commitment to maintaining BTRTA standards of corporate citizenship and environmentalism. The agreements made by BTRTA's board and controlling shareholders made certain that the corporation's values would perpetuate under Ravert Ward's new ownership.

The Omnicare Court erred when it held that the defensive devices used in the Genesis-NCS merger agreement did not pass Unocal scrutiny because they were designed to coerce the consummation of the Genesis merger and preclude the consideration of any superior transaction. Omnicare, 818 A.2d at 936. However, as Chief Justice Veasey's dissenting opinion clarifies, the deal protection measures were not adopted unilaterally by the board to fend off an existing hostile offer that threatened the corporate policy an effectiveness of NCS. Omnicare, 818 A.2d at 943 (Veasey, J., dissenting). They were adopted because Genesis would not save NCS without these provisions. Id.

Moreover, Unitrin's coercive and preclusive prongs police the effect of board action on existing tender offers and proxy contests to ensure that the board cannot permanently impose its will on the stockholders. Omnicare, 818 A.2d at 944 (Veasey, J., dissenting). This Court has also held that where directors control the corporation their voting agreements should not be subject to a Unocal analysis because the joint action of stockholders and directors represent "the highest and best form of corporate democracy." Williams, 671 A.2d at 1381; Stroud v. Grace, 606 A.2d 75, 83 (Del. 1992). Despite a joint vote by the NCS Board and shareholders, the Omnicare Court still determined that the deal protection devices employed by NCS and Genesis were not reasonable under a Unocal analysis. 818 A.2d at 939.

Like Omnicare, the very defensive measures that CFI asserts as coercive and preclusive were approved by the majority shareholders Sunstein and Sarabhai through the lens of their independent assessment

of the merits of the transaction. Here, the defensive devices were an integral part of the merits of the transaction because without the devices Ravert Ward would not consummate the merger and BTRTA would lose the acquirer that BTRTA's board and controlling shareholders determined most embodied the values of environmentalism and corporate responsibility. As such, Sunstein and Sarabhai made the informed decision, in their capacity as shareholders, to commit their voting power to the Ravert Ward merger. The minority stockholders in BTRTA, including CFI, knew that Sunstein and Sarabhai's votes alone could solidify the merger. Here, a coercion analysis is meaningless because Sunstein and Sarabhai held the deciding votes to approve the Ravert Ward merger. The minority shareholders should have been on notice when they invested in BTRTA that such result could occur. Thus, the Unocal and Unitrin analysis has no application here.

b. Omnicare Should Be Overruled Because the Court Failed to Conduct an Entire Fairness Analysis.

One final issue with the Omnicare decision is that the Court did not conduct an entire fairness analysis of the Genesis-NCS merger. If a director fails to carry his initial Unocal burden, his actions are not automatically invalidated, but instead the director has the burden of showing the challenged decision passes the entire fairness standard. See Burcham v. Unison Bancorp, Inc., 77 P.3d 130, 149 (Kan. 2003) (citing Unitrin, 651 A.2d at 1371). Therefore, the Omnicare Court did not apply all applicable legal standards to the proposed merger agreement between NCS and Genesis. In failing to apply the entire fairness standard, the court did not see that the Genesis

Merger Agreement does pass entire fairness scrutiny; therefore, this Court should overrule Omnicare.

The entire fairness standard embraces two concepts: fair dealing and fair price. Emerald Partners, 787 A.2d at 97 (citing Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983)). Fair dealing embraces the questions of when the transaction was timed, how it was negotiated, and how the approvals of the directors and the stockholders were obtained. Emerald Partners, 787 A.2d at 97. Fair price relates to the economic and financial considerations of the proposed action and any other elements that affect the intrinsic or inherent value of the company's stock. Id.

The Genesis merger agreement would have passed fair dealing because it was the only deal offered to NCS. NCS was facing bankruptcy at the time the Genesis agreement was drafted. NCS needed cash to sustain their business and the only certain merger agreement present at the time was offered by Genesis. Previously, Omnicare made a merger proposal to NCS; however, Omnicare later withdrew the offer. In the absence of another merger agreement, and to prevent bankruptcy, NCS accepted the lock-up agreement with Genesis. Moreover, the controlling shareholders voted on the Genesis agreement, only after a series of meetings with the independent committee, in which they discussed the benefits and risks involved with accepting the Genesis merger agreement.

The Genesis agreement also would have passed the fair price test because Genesis offered to repay the NCS senior debt in full, pay the

notes' par value with a combination of cash and Genesis stock, pay the NCS shareholders $24 million of Genesis stock, and assume the additional liabilities to trade and other unsecured creditors. Under this agreement, NCS would be out of debt and its shareholders would receive an optimal deal that paid them above market value for their stock. Thus, the Genesis merger agreement would have survived the entire fairness scrutiny.

Assuming arguendo that BTRTA violated its duty of loyalty to its shareholders, the Ravert Ward merger agreement withstands entire fairness scrutiny because it meets the standards of fair dealing and fair price. In an effort to secure an acquirer capable of purchasing BTRTA, BTRTA consulted Eberhard to identify companies interested in acquiring BTRTA. BTRTA's board of directors met on December 13, 2011 to consider the proposed Ravert Ward Merger Agreement and made a sound decision that Ravert Ward was substantially more environmentally responsible than CFI. After careful negotiation between Ravert Ward and BTRTA, BTRTA shareholders received $15.50 per share, a price well above the market value. Therefore, the Ravert Ward Merger agreement will pass entire fairness scrutiny.

CONCLUSION

For the reasons stated herein, this Court should reverse the judgment of the Court of Chancery.