IN THE SUPREME COURT OF
THE STATE OF DELAWARE

BTRTA FOREST PRODUCTS, INC., a Delaware corporation, MATTHEW SUNSTEIN, VIKRAM SARABHAI, MICHAEL F. ALLEN, MILES D. LIU, KATHLEEN L. TODMAN, HERBERT McCUSKER, PAULA ABAZIAN, JANICE L. STERN, WILLIAM D. HEMPHILL, RAVERT WARD L.P., and BTR ACQUISITION CORP.,	)	No. 142, 2012
Defendants Below, Appellants,	)	Court Below: Court of Chancery of the State of Delaware in and for New Castle County
v.	)	Civil Action No. 6943-CJ
CONSOLIDATED FOREST INDUSTRIES CO., a Delaware corporation,	)	
Plaintiff Below, Appellee.	)	

APPELLEE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

This is an appeal from the Court of Chancery's January 26, 2012 Memorandum Opinion ("Op."). The Court of Chancery granted Plaintiff Consolidated Forest Industries Co.'s ("CFI") motion for a preliminary injunction. Defendant BTRta and the individual members of BTRta's Board of Directors applied for an interlocutory appeal under Supreme Court Rule 42. This Court granted Defendants' appeal.

On appeal BTRta asserts that the Court of Chancery erred in granting CFI's motion for a preliminary injunction to prevent a merger between BTRta and Ravert Ward. BTRta further asserts that the means in which they entered a merger agreement with Ravert Ward was reasonable. BTRta also argues that Article II of the Certificate of Incorporation validly permitted BTRta's directors to consider factors beyond shareholder value when approving a change in control transaction. Thus, BTRta asserts CFI would not be likely to succeed on the merits of their claim, and a preliminary injunction is inappropriate.

The Court of Chancery correctly granted a preliminary injunction. It properly applied Delaware Corporate Law to the transaction to review the directors' conduct in light of a change of control transaction and their duty to maximize shareholder value. Additionally, the Court of Chancery correctly held denounced the validity of Article II because it would enable directors to act with less regard for the shareholders' interest than the directors' fiduciary duties required.

SUMMARY OF ARGUMENT

1. The Court of Chancery properly granted CFI's motion for a preliminary injunction. CFI has a reasonable probability of success on the merits. When directors initiate a process to sell control of the corporation, the process must be reasonable, and its objective must be to maximize shareholder value. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986). BTRta's directors failed to conduct a reasonable process to maximize shareholder value. First, the transaction with Ravert Ward failed to maximize shareholder value. Second, deal protection measures used to secure the Ravert Ward transaction did not confer any substantial benefit on BTRta's shareholders. Third, the directors considered BTRta's future corporate policy under Ravert Ward's control in the merger process. Finally, Article II of BTRta's certificate of incorporation does not validly permit the directors to consider beyond shareholder value in change of control transactions.

2. This Court should apply *Omnicare* to invalidate the deal protection measures that entirely locked-up the BTRta and Ravert Ward transaction. Deal protection devices that entirely lock-up a merger vote in the absence of a fiduciary out clause are not enforceable and must yield to the responsibility of the directors to discharge their fiduciary duties. *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 939 (Del. 2003). The effect of the controlling shareholders' agreement and the mandatory shareholder vote without a fiduciary out clause locked-up the merger between BTRta and Ravert Ward. The deal protection measures are not enforceable under Delaware law.

STATEMENT OF THE FACTS

A shared passion for engineering and environmentalism motivated Matthew Sunstein and Vikram Sarabhai to found BTRta Forest Products, Inc. in 1987. (Op. 5). BTRta embodies Sunstein and Sarabhai's vision through its use of sustainable tree harvest and minimal adverse environmental production impacts. (Op. 4).

Sunstein and Sarabhai initially financed their company through bank loans and equity infusions from family and friends. (Op. 5). In 1997, Sunstein and Sarabhai sought out a $15 million equity infusion from Cedar Street Partners, LLP. *Id.* In exchange for the infusion, Cedar Street received a newly created class of preferred stock. *Id.*

Three years later, BTRta engaged in an initial public offering of Class A Common Stock. *Id.* BTRta's shares currently trade on the NASDAQ Stock Market between $13 and $14 per share. *Id.* Sunstein, Sarabhai, and members of their families own all of the Class B stock. *Id.* This ownership constitutes about 50.4% of BTRta's voting power. *Id.* Sunstein and Sarabhai are directors on BTRta's board. (Op. 4). CFI owns 4,300 shares of BTRta's common stock. (Op. 2).

By 2011, Sunstein and Sarabhai became disenchanted with their managerial roles and responsibilities at a publicly held corporation. (Op. 7). They expressed the view that the BTRta's status as a public company frustrated their efforts to attend to important aspects of the business. *Id.* To address this concern, Sunstein and Sarabhai considered selling their BTRta stock or acquiring BTRta's publicly held shares. (Op. 7-8). BTRta's directors retained Eberhard Jefferson, L.P. ("Eberhard") as financial advisor to explore potential

transactions. (Op. 8). Information from Eberhard convinced Sunstein and Sarabhai the most desirable option was to shed controlling ownership and sell BTRta. *Id.* After informing the board of directors of their view, several independent directors suggested any sale of BTRta should include the sale of its publicly held shares in addition to Sunstein and Sarabhai's Class B Common Stock shares. *Id.* On May 18, 2011, the directors unanimously resolved Eberhard should begin to identify and elicit bids to acquire BTRta's Class A and Class B shares. *Id.*

Economic conditions caused the acquisition process to move slowly. *Id.* But, in September 2011 CFI proposed a merger price at $16.50 per share. (Op. 8-9). CFI is one of the world's largest producers of paper and wood products. (Op. 3). Sunstein and Sarabhai were resistant. (Op. 9). While the offer was a premium above the traded market price, Sunstein and Sarabhai were concerned that CFI could not credibly maintain the environmentally responsible vision they promoted as BTRta's founders and directors. *Id.*

In an effort to show its commitment to environmental practices, CFI agreed to hire Sunstein and Sarabhai as consultants to the environmental committee of CFI's board of directors and increased their offer to $17 per share. *Id.*

On October 17, 2011, BTRta's directors adopted the merger agreement with CFI. *Id.* A press release announced the deal. *Id.* The agreement included a clause that permitted BTRta's directors to seek out and terminate the agreement in the event BTRta received a

superior proposal that would better serve the best interests of BTRta. (Op. 10). The termination fee was $15 million. *Id.*

In late October 2011, BTRta received an initial offer from Ravert Ward for $13 per share. (Op. 11). Ravert Ward is a boutique acquisition firm specializing in private acquisitions of smaller public companies. (Op. 4). Ravert Ward had been involved in several private acquisitions of companies focused on corporate social responsibility. (Op. 10).

In December 2011, Ravert Ward offered $15.50 per share and insisted on deal protection measures that included: (1) a written agreement by Sunstein and Sarabhai to vote all their shares of Class B Stock in favor of the merger; (2) a mandatory shareholder vote on or before April 1, 2012, even if the directors no longer found the merger desirable; (3) no solicitation for a competing merger proposal prior to the shareholder vote; and (4) a $15 million termination fee. (Op. 11-12).

On December 13, 2011, the directors declared the Ravert Ward $15.50 per share offer superior to CFI's $17 per share offer. (Op. 12). The directors rested their finding on the conclusion that Ravert Ward was substantially more likely to continue environmentally reasonable practices. *Id.* Additionally, BTRta's shareholders still received a per-merger premium over market price. *Id.* Sunstein and Sarabhai entered into voting agreements. *Id.*

In making this decision, the directors rest on Article II of BTRta's certificate of incorporation. Article II permits directors to rely on the BTRta's best interests in a change of control context.

(Op. 6). "Best interests" are defined as: (1) stakeholder interests; (2) shareholder interests; and (3) environmental effects of BTRta's operations. *Id.* BTRta's "stakeholder interests" include "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." *Id.* Article II also permits directors to rely on this provision without liability for a breach of their fiduciary duties. *Id.* But, the prospectus describing Article II states the validity of this provision is uncertain. (Op. 7). Additionally, the directors adopted Article II prior to the 1997 cash infusion from Cedar Street. *Id.*

BTRta's directors then informed CFI they had entered into a merger agreement with Ravert Ward at $15.50 per share after they determined it was a superior proposal to CFI's $17 per share offer. (Op. 13). On December 16, 2011, CFI brought suit in the Court of Chancery to enjoin consummation of the merger. (Op. 13).

ARGUMENT

I. This Court should affirm the Court of Chancery's grant of a preliminary injunction because BTRta's directors breached their duty to maximize shareholder value in a cash change of control transaction.

A. Question Presented

Do directors breach their fiduciary duties when they fail to maximize shareholder value in a cash change of control transaction by favoring one bidder in an attempt to further current corporate policy?

B. Scope of Review

Generally the grant or denial of a preliminary injunction is reviewed for abuse of discretion. *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 393 (Del. 1996). In a corporate merger and acquisition case, the Court exercises *de novo* review of the legal issues. *Id.* at n. 4. But, in the exercise of judicial restraint the Court does not ignore the findings of the trial judge if those findings are supported by the record and are the product of an orderly and logical deductive process. *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1341 (Del. 1987).

C. Merits of Argument

1. Enhanced scrutiny is the appropriate standard to apply in reviewing directors' conduct during a change of control transaction.

Directors are responsible for managing the business and affairs of a corporation. 8 Del.C. § 141(a). In discharging this responsibility, directors owe fiduciary duties of care and loyalty. *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984). These duties apply with equal force in the context of a merger or acquisition. *Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985). Under normal circumstances, the Court should not interfere with the directors' managerial decisions. *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 42 (Del. 1993). The business judgment rule embodies this deference. *Id.*

However, the Court will take a more direct and active role in overseeing the directors' decisions in certain circumstances. *Id.* Enhanced scrutiny will apply when directors approve a change of

control transaction. *Id.* Enhanced scrutiny ensures the directors' conduct is reasonable under the circumstances. *Id.*

Enhanced scrutiny is the applicable standard to review the BTRta's directors' conduct throughout the change of control transaction. In May 2011 BTRta's board of directors unanimously approved a resolution for Eberhard to identify and elicit bids for the acquisition of BTRta's entire equity. The directors then entered two cash-merger agreements to sell control of BTRta. First, the directors entered an agreement with CFI on October 17, 2011, to sell the corporation in a cash-merger transaction. Then, on December 13, 2011, the directors abandoned the CFI merger and entered a second cash-merger transaction with Ravert Ward. Because this case involves a change of control transaction, the Court should apply enhanced scrutiny to review the directors' conduct.

2. After completing a merger agreement with CFI, the directors failed to maximize shareholder value when they accepted a lower cash offer from Ravert Ward in order to continue BTRta's corporate policy.

Once directors initiate a process to sell control of the corporation, the process must be reasonable, and its aim must be to maximize shareholder value. *Revlon*, 506 A.2d at 182. The directors must get the best price. *Ivanhoe*, 535 A.2d at 1344. They must act neutral and in accordance with fundamental duties of care and loyalty. *Barkan v. Amsted Industries, Inc.*, 567 A.2d 1279, 1286 (Del. 1989). A change of control eliminates the current directors' authority to implement their future strategic vision. *QVC*, 637 A.2d at 50. If the directors accept an offer that is lower on its face, the acceptance cannot be justified on the basis of future corporation strategy. *Id.*

The enhanced scrutiny test requires directors to engage in an adequate process to obtain a reasonable result. *Id.* at 45. Recognizing that directors are best equipped to make a judgment regarding the sale of a corporation, their decision must only be reasonable, not perfect. *Id.*

BTRta's directors engaged in an unreasonable process that obtained an unreasonable result. Their conduct deprived BTRta's shareholders of maximum profit per share in a cash change of control transaction by accepting an offer that was lower on its face. First, the directors abandoned a cash offer of $17 per share for an offer of $15.50 per share. Second, the directors agreed to deal protection measures that precluded a continued search to obtain maximum value for their shareholders without conferring any substantial benefit. Finally, the directors impermissibly favored a merger with Ravert Ward in order to continue the directors' environmentally responsible strategic vision. Thus, the directors' unreasonable conduct failed to result in a cash change of control transaction that maximized shareholder value.

i. BTRta's merger agreement with Ravert Ward did not maximize shareholder value.

Directors have special obligations in a change of control transaction. *QVC*, 637 A.2d at 43. Directors must maximize the corporation's value for the shareholders' benefit. *Revlon*, 506 A.2d at 182. The directors become "auctioneers charged with getting the best price for the stockholders." *Id.*

To achieve a reasonable process and result, the directors must act in accordance with their fundamental duties of care and loyalty. *Barkan*, 567 A.2d at 1286. There is "no single blueprint a board must follow to fulfill its duties." *Id.* But, when it becomes clear that a change of control will result, the directors must act to obtain the highest possible price for the shareholders. *Id.*

The directors would have reasonably maximized shareholder value through a completed merger with CFI at $17 per share. Instead, the directors abandoned the CFI agreement in favor of an inferior bid.

Prior to the litigation, BTRta's Class A common stock traded between $13 and $14 per share. In September 2011, CFI offered a cash merger at $16.50 per share. After BTRta's directors expressed concern regarding CFI's commitment to maintain environmentally responsible practices, CFI increased their offer to $17 per share. Additionally, CFI agreed to hire Sunstein and Sarabhai as consultants to CFI's environmental committee. BTRta's board adopted the CFI merger agreement on Oct. 17, 2011.

Still concerned with CFI's commitment to environmentally responsible practices, BTRta's directors actively sought out a superior proposal. But contrary to their duty to obtain the highest price for the shareholders, the directors focused on entering a transaction with an environmentally responsible private company. So, on December 13 the directors entered a merger agreement with Ravert Ward. Ravert Ward's best offer was $15.50 per share.

Beyond receiving $1.50 less per share in the cash merger with Ravert Ward, the shareholders will also shoulder the burden of a $15

million termination fee owed to CFI. The payment of this termination fee further decreases the Ravert Ward transaction's value.

Under the circumstances of a change in control transaction, the directors should have fulfilled the CFI merger agreement and maximized shareholder value. Instead, the directors abandoned the CFI merger and favored a merger agreement with Ravert Ward that would result in an inferior shareholder value per share.

ii. Deal protection measures with Ravert Ward failed to confer any substantial benefit upon BTRta's shareholders.

Once the decision has been made to sell the corporation, the directors must obtain the highest value reasonably available for the shareholders. *Mills Acquisition Co. v. MacMillan, Inc.*, 559 A.2d 1261, 1288 (Del. 1989). If directors grant a bid-ending provision, the agreement must confer a substantial benefit upon stockholders. *Id.* at 1284. When a no-shop clause bestows no material advantage on the stockholders, the process imposing the condition must survive careful scrutiny. *Id.* at 1286.

Directors must justify favoritism toward a particular bidder with reference to the objective to maximize shareholder profit. *In re The Topps Company Shareholders Litigation*, 926 A.2d 58, 64 (Del. Ch. 2007) (citing *QVC*, 637 A.2d at 49-50). And, directors commit a breach of fiduciary duty when they bias the process against one bidder in an effort to sway the process toward the bidder more likely to continue current management, but not in an effort to maximize shareholder advantage. *Id.* (citing *MacMillan*, 559 A.2d at 1282-83).

Furthermore, contractual provisions preventing a target corporation from seeking alternative value-maximizing bids do not limit directors' fiduciary duties. *QVC*, 637 A.2d at 48. "To the extent such provisions are inconsistent with those duties, they are invalid and unenforceable." *Id.*

The directors' bias towards Ravert Ward resulted in deal protective measures that precluded the directors from fulfilling their *Revlon* duty to maximize shareholder value. Ravert Ward insisted on deal protection measures for their benefit. These measures operate to favor a transaction that does not bestow any material advantage on the shareholders. The measures are inconsistent with the directors' duties. They are invalid and unenforceable.

In addition to the no-shop provision, the mandatory shareholder vote coupled with Sunstein and Sarabhai's voting agreements function to preclude any and all director action to seek and enter a post-agreement but pre-vote superior proposal. Sunstein, Sarabhai, and their family hold a majority of the voting stock. If put to a shareholder vote, with their contractual obligation to vote in favor of the merger, the merger will certainly pass despite any superior offers. The directors use this as a crutch to support a merger with a company that will further their corporate management.

The measures secure a transaction with a lower face value than CFI's offer, but confer no substantial benefit. All deal protection measures were part of a merger agreement with a cash transaction value of $15.50 per share. The directors entered this agreement after they abandoned a cash transaction for $17 per share. In return for the

deal protection measures with Ravert Ward, the shareholders received nothing, other than a lower price, that differed from the CFI merger agreement. The deal protection measures only fortify Ravert Ward's inferior offer.

iii. Directors impermissibly considered the greater possibility Ravert Ward would continue BTRta's corporate policy.

The duty of loyalty requires directors obtain the best value for shareholders. *Ivanhoe*, 535 A.2d at 1344. The directors have a duty to protect the interests of the shareholders and an obligation to refrain from conduct that would deprive them of profit or advantage. *Id.* at 1345. Directors must avoid any conflict between duty and self-interest. *Id. Revlon* duties seek to prevent conflicts that arise in a merger or acquisition by demanding directors act with concern for the shareholder. *Barkan*, 567 A.2d at 1286.

A change in control supplants the current directors' authority to implement and continue a strategic corporate vision. *QVC*, 637 A.2d at 50. Any significant disparity of value between a bid accepted and a bid repudiated "cannot be justified on the basis of the directors' vision of future strategy." *Id.* In the case of a *Revlon* duty, a cash merger is treated as if there is no tomorrow for the shareholders. *Equity-Linked Investors, LP v. Adams*, 705 A.2d 1040, 1055 (Del. Ch. 1997). Thus, the directors must act to maximize shareholder value. *Revlon*, 506 A.2d at 182.

The directors' sole purpose in accepting the Ravert Ward merger agreement was to further BTRta's directors' environmentally responsible corporate vision. To justify that the Ravert Ward merger

was superior to the CFI merger, the directors rested on their conclusion on the basis that Ravert Ward was substantially more likely to continue environmentally responsible practices.

While this is commendable, the directors' conclusion does not comport with established law. Because there is no tomorrow for BTRta and its shareholders by virtue of the cash merger, the directors had a duty to seek maximum profit in a sale for the shareholders' benefit, not just a premium above market price. Their personal desire to continue BTRta's environmental policy prevented them from fulfilling their duty to obtain the best value for the shareholders' benefit. The directors' action minimized shareholder value by $1.50 per share.

In conducting the change of control cash merger, the directors' process and result were unreasonable. Under *Revlon*, the directors owed a duty to maximize shareholder value. They failed to do so. The directors abandoned a merger agreement offering $17 per share for an agreement offering $15.50 per share with no other material advantage. Then, the directors entered deal protection measures favoring this inferior agreement. They impermissibly did so out of a desire to continue BTRta's corporate policy in spite of their duty to maximize shareholder value.

3. Article II of BTRta's certificate of incorporation does not eliminate the shareholders' ability to seek injunctive relief on a claim the directors breached their duty of loyalty to maximize shareholder value.

A certificate of incorporation may contain a provision eliminating the directors' personal liability to its shareholders for monetary damages for the breach of a duty of care. 8 Del.C. §

102(b)(7). But, the provision may not limit directors' liability for a breach of loyalty. *Id.*

The purpose of the statute is to permit shareholders to adopt a provision in the certificate of incorporation to exculpate directors from personal liability for the payment of monetary damages for breaches of their fiduciary duty of care. *Emerald Partners v. Berline*, 787 A.2d 85, 90 (Del.Ch. 2001)(citing *Malpiede v. Townson*, 780 A.2d 1075, 1095 (2001)). The statute does not operate to defeat a valid claim on the merits. *Id.* at 91-92.

Even if the statute permits eliminating monetary damages for the directors' violation of their duty of care, the statute does not permit eliminating the directors' liability for breaches of loyalty. *Lyondell Chemical Co. v. Ryan*, 970 A.2d 235, 239-40 (2009). Despite a valid exculpation clause, a case may proceed on a claim that directors violated their duty of loyalty. *Id.* The duty of loyalty requires directors refrain from conduct that would deprive shareholders of profit. *Ivanhoe*, 535 A.2d at 1345. Furthermore, the *Revlon* mandate implicates duties of care and loyalty. *Id.* at 1344-45.

Article II of BTRta's certificate of incorporation is not valid. The directors adopted Article II in 1997, prior to BTRta's initial public offering in 2000. The directors, not the shareholders, adopted the provision. Since the prospectus explicitly mentions Article II, it may be argued that shareholders purchasing stock adopted the provision even though it existed prior to the IPO. But, the prospectus questions its validity. And, the record does not reflect any shareholder adoption.

Even if Article II is valid, it does not operate to eliminate CFI's claim. Under the statute authorizing its existence and by its own terms, Article II may only eliminate a plaintiff's ability to recover monetary damages from directors for a breach of their duty of care in relying upon the best interests of 'stakeholders' in a change of control transaction. But, this is not the case for the application of Article II.

CFI does not seek to recover monetary damages for a breach of the directors' duty of care. Rather, CFI seeks to enjoin the consummation of the merger between BTRta and Ravert Ward. Their claim asserts the directors violated their fiduciary duties under *Revlon* and *Ivanhoe* to refrain from conduct depriving shareholders of maximum value in a change of control transaction. Article II does not operate to bar CFI's claim or limit its ability to obtain injunctive relief. Article II has no application to this case.

II. Deal protection devices that entirely lock-up a proposed merger and contain no fiduciary out are not enforceable under *Omnicare* in a cash change of control transaction.

A. Question Presented

Should *Omnicare* apply where directors fail to obtain maximize value for the shareholder when they agree to deal protection devices that favor one bidder over another in a cash merger?

B. Scope of Review

As in Part I, the Court exercises *de novo* review of the legal issues in a corporate merger or acquisition case. *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 393 n.4 (Del. 1996). But, the Court of Chancery's findings receive deference. *Ivanhoe*, 535 A.2d at 1341.

C. <u>Merits of Argument</u>

1. *Omnicare* and *Revlon* should apply to review the deal protection devices that locked-up BTRta's change of control transaction with Ravert Ward.

This case presents the ideal factual situation under which *Omnicare* should apply. BTRta is a financially stable corporation. The change in control was prompted by the founders' disenchantment with the ownership duties of a public corporation. Two directors, also majority shareholders, became determined to sell the corporation to an entity committed to maintaining BTRta's strategic vision. By locking-up a merger with unreasonable deal protection devices, they disregarded the fiduciary duties they owed to the corporation's shareholders. The *Revlon*/*Unocal* enhanced scrutiny applies under these circumstances. Moreover, *Omnicare* is instructive. While *Omnicare* may not have been the perfect ruling under the facts presented, the facts at bar present the ideal situation in which to apply *Omnicare*.

This Court has invalidated the deal protection devices adopted by the target corporation's board of directors. *Omnicare*, 818 A.2d at 939. In reaching the decision, this Court applied the enhanced judicial scrutiny test from *Unocal* to assess defensive tactics designed to protect a target corporation's merger agreement. *Id.* at 935.

There is a factual difference between this case and *Omnicare*. In *Omnicare*, the stock-for-stock merger agreement did not result in a change of control. *Id.* at 934. For that reason, *Revlon* duties were not triggered. Here, the cash merger agreement demonstrates a change of control in the target corporation. Therefore, the *Revlon* enhanced

judicial scrutiny applies to review the directors' conduct in light of *Omnicare*'s ruling.

In the sale of control context, the directors' primary focus must be on the objective to secure the transaction that will offer the best value reasonably available for the shareholders. *QVC*, 637 A.2d at 44. The directors must exercise their fiduciary duties to further that objective. *Id.* Additionally, this Court established that enhanced judicial scrutiny should be applied to directors' adoption of defensive measures in response to a merger or acquisition that the directors reasonably believe is a threat to corporate policy and effectiveness. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954-55 (Del. 1985). The *Unocal* standard applies "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." *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1372 (Del. 1995).

Because a transaction results in a change of control, enhanced scrutiny applies to review of the deal protection measures involved. Directors must establish they exercised their fiduciary duties to obtain the best value reasonably available for the shareholders. Revlon, 506 A.2d at 184. Additionally, they must establish the deal protection devices were reasonable. *Unitrin*, 651 A.2d at 1373.

Unocal requires further analysis. The directors must show the response was not draconian. *Unocal*, 493 A.2d at 955. "Draconian" refers to a response that is coercive or preclusive. *Unitrin*, 651 A.2d at 1365. A response is "coercive" if it is aimed at forcing upon shareholders a management-sponsored alternative to a hostile offer.

Id. at 1387. A response is "preclusive" if it deprives shareholders of the right to receive all tender offers or precludes a bidder from seeking control by fundamentally restricting proxy contests or otherwise. *Id.*

In *Omnicare*, this Court explained its reasons for applying the *Unocal* test to deal protection devices:

> There are inherent conflicts between a board's interest in protecting a merger transaction it has approved, the stockholders' statutory right to make the final decision to either approve or not approve a merger, and the board's continuing responsibility to effectively exercise its fiduciary duties at all times after the merger agreement is executed.... A board's decision to protect its decision to enter a merger agreement with defensive devices against uninvited competing transactions that may emerge is analogous to a board's decision to protect against dangers to corporate policy and effectiveness when it adopts defensive measures in a hostile takeover contest. *Omnicare*, 818 A.2d at 937.

Thus, enhanced scrutiny under *Revlon* and *Omnicare* is the appropriate standard to apply in reviewing the directors' conduct. This review will ensure that the directors were acting in the shareholders' best interest when they used deal protective devices to lock-up a merger.

2. BTRta's directors breached its fiduciary duties in authorizing the deal protection measures.

Once directors authorize a merger or buyout, the company is for sale. *Revlon*, 506 A.2d at 182. Consequently, the directors' duty changes from the preservation of the company as a corporate entity to

the maximization of the company's value at a sale for the shareholders' benefit. *Id.* Any consideration of corporate policy and effectiveness and *any question of defensive measures* thus become moot. *Id.* "Obtaining the highest price for the benefit of the stockholders should [become] the central theme guiding director action." *Id.*

Sunstein and Sarabhai became disenchanted with their roles and responsibilities managing a public held company. After discussions with Eberhard, Sunstein and Sarabhai became convinced that the most desirable option for them would be to shed the responsibilities of controlling ownership and sell BTRta. On May 18, 2011, the directors unanimously resolved to identify and elicit bids for BTRta. At this point the company was for sale. The directors now had the duty to maximize BTRta's value for the shareholders' benefit. Furthermore, any consideration of defensive measures in the sale of BTRta should have become moot.

Nevertheless, the directors agreed to a Ravert Ward merger agreement including the following deal protection provisions: (1) Sunstein and Sarabhai would vote all their shares of Class B common stock in favor of the merger (the "voting agreement"); (2) the directors would be required to present the merger agreement to a shareholder vote as practicable, before April 1, 2012, even if the directors no longer considered the Ravert Ward merger desirable ("force-the-vote provision"); (3) the directors would not be permitted to solicit any competing merger proposal prior to the shareholder vote (the "no-shop provision"); and (4) a termination fee of $15 million (the "termination fee").

The deal protections solidified Ravert Ward's $15.50 per share bid in the face of CFI's $17 per share bid. This results in greater than $40 million in shareholder loss. The directors approved the deal protection measures based on their conclusion that Ravert Ward was more likely to continue BTRta's environmentally responsible practices. The directors breached their *Revlon* fiduciary duties by deciding to sell the company on a non-shareholder basis. "Such concern for non-stockholder interests is inappropriate when an auction among active bidders is in progress, and the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder." *Revlon*, 506 A.2d at 182.

A Delaware corporation's shareholders are entitled to rely upon the board to discharge its fiduciary duties at all times. *Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998). "The fiduciary duties of a director are unremitting and must be effectively discharged in the specific context of the actions that are required with regard to the corporation or its shareholders as circumstances change." *Omnicare*, 818 A.2d at 938 (citing *Moran v. Household Int'l Inc.*, 500 A.2d 1346, 1357 (Del. 1985)).

Here, the directors breached their fiduciary duties by locking the corporation into the Ravert Ward merger without establishing a fiduciary out clause. The directors essentially abrogated their fiduciary duties to shareholders through the combination of the voting agreement, no-shop provision, and force-the-vote provision. In *QVC*, this Court recognized that "[w]hen a majority of a corporation's voting shares are owned by a single person or entity, or by a cohesive

group acting together, there is a significant diminution in the voting power of those who thereby become minority stockholders." 637 A.2d at 42. "Absent effective protective measures, minority stockholders must rely for protection solely on the fiduciary duties owed to them by the directors and the majority stockholder, since the minority stockholders have lost the power to influence corporate direction through the ballot." *Id.* at 43.

Because Sunstein and Sarabhai have 50.4% of BTRta's voting power, the voting agreement requiring them to vote their shares in favor of the Ravert Ward merger, coupled with the force-the-vote provision, essentially secures the approval of the Ravert Ward transaction before it is even presented to the shareholders. The deal protection restrictions require the directors to present the merger proposal to the shareholders, even if the directors no longer believe the transaction would benefit the company. The no-shop provision prevents the directors from exercising its fiduciary duties by seeking the highest value attainable for the shareholders. Not only did the directors prohibit themselves from seeking other offers, the directors prevented themselves from even considering other offers in the event a better proposal emerged.

"To the extent that a [merger] contract, or a provision thereof, purports to require the board to act or not act in such a fashion as to limit the exercise of its fiduciary duties, it is invalid and unenforceable." *QVC*, 637 A.2d at 51. Restatement (Second) of Contracts § 193 provides that a "promise by a fiduciary to violate his fiduciary duty or a promise that tends to induce such a violation is

unenforceable on grounds of public policy." Therefore, because the merger agreement did not provide for a fiduciary out clause, the broad breached its duties to the shareholders by limiting the exercise of its fiduciary duties to find the best available price for the shareholders.

3. The deal protection measures are unreasonable.

Unocal requires directors to demonstrate that their deal protection devices were "reasonable in relation to the threat posed." *Omnicare*, 818 A.2d at 935. This inquiry involves a two-step analysis. Directors must first establish that the merger deal protection devices adopted in response to the threat were not coercive or preclusive. *Id.* Then, they must demonstrate that the response was within a "range of reasonable responses" to the threat perceived. *Id.* The *Unocal* standard provides for a disjunctive analysis. *Unitrin*, 651 A.2d at 1387. If the defensive measures are either preclusive or coercive they are impermissible. *Id.*

Here, the deal protection devices are both preclusive and coercive. They are impermissible. In *Brazen v. Bell Atlantic Corp.*, this Court explained that the determination of whether a stockholder vote has been robbed of its effectiveness by coercion depends on the facts of the case. 695 A.2d 43, 50 (Del. 1997). In *Omnicare*, this Court applied this rule by explaining that the target corporation's shareholders are subject to impermissible coercion where they are forced to accept a particular merger because of the structural defenses approved by the target's board. 818 A.2d at 936. Consequently, any shareholder vote would be robbed of its

effectiveness by the impermissible coercion that predetermined the outcome of the merger without regard to the merits of the transaction at the time of the shareholder vote. *Id.*

In this case, the minority shareholders were required to accept the Ravert Ward merger because it was *a fait accompli*. Because Sunstein and Sarabhai had already executed the voting agreement, solidifying 50.4% of the voting shares in favor of the Ravert Ward merger, the merger was complete. Additionally, the force-the-vote provision required the board to present the merger to the shareholders, regardless of the directors' recommendations. Therefore, the merger was *a fait accompli*. The merger was guaranteed before the shareholder vote.

The deal protection devices were preclusive in the sense that the shareholders were deprived of their right to receive any other tender offers after the board entered into the Ravert Ward merger agreement. The force-the-vote provision required the board to present the Ravert Ward proposal to the shareholders even though CFI had proposed an offer valued more than $40 million above the Ravert Ward offer. Consequently, even though the shareholders would have obtained the greatest benefit and highest value from the CFI offer, the directors had already made it mathematically impossible and realistically unattainable for the CFI transaction or any other proposal to succeed, no matter how superior the proposal.

The deal protection devices approved by the directors were designed to coerce the consummation of the Ravert Ward merger and preclude the consideration of any superior transaction. This is

directly in conflict with the directors' fiduciary duties to maximize shareholder value. The directors' defensive devices are not within a reasonable range of responses to the perceived threat of losing the Ravert Ward offer because they are preclusive and coercive.

Omnicare's ruling should be applied to the facts of this case. BTRta's directors approved coercive and preclusive deal protection devices for a tender offer that violated the directors' fiduciary duties to obtain the highest value for the shareholders. Because enhanced scrutiny review applies, the facts of this case present the ideal situation in which the *Omnicare* ruling should apply.

CONCLUSION

This Court should uphold the Court of Chancery's grant of CFI's motion for a preliminary injunction. BTRta's board of directors failed to maximize shareholder value in a change of control transaction in violation of their fiduciary duties required by *Revlon*. Furthermore, the deal protection devices locked-up the transaction with Ravert Ward and did not contain a fiduciary out clause. Under *Omnicare*, the agreement is not enforceable.