

**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,	:	No. 142, 2012
JANICE L. STERN, WILLIAM D. HEMPHILL,	:	
RAVERT WARD L.P., and BTR ACQUISITION	:	Court Below:
CORP.,	:	Court of Chancery,
	:	C.A. No. 6943-CJ
Defendants Below,	:	
Appellants	:	
	:	
v.	:	
	:	
CONSOLIDATED FOREST INDUSTRIES CO.,	:	
A Delaware corporation,	:	
	:	
Plaintiff Below,	:	
Appellee	:	

APPELLEE'S OPENING BRIEF

Team V
Counsel for Appellee

February 10, 2012

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NATURE OF PROCEEDINGS

Plaintiff-Appellee Consolidated Forest Industries Co. ("CFI") owns 4,300 shares of Class A common stock of Defendant-Appellant BTRta Forest Products, Inc. ("BTRta"), a Delaware corporation. It is undisputed that on October 17, 2011, CFI and BTRta entered into a merger agreement where CFI agreed to purchase all of BTRta's Class A and Class B common stock. It is also undisputed that BTRta entered into a second merger agreement with Ravert Ward on December 13, 2011. After learning of the BTRta board's decisions to forego the CFI merger and to execute and lock-up a merger agreement with Ravert Ward, CFI brought this action in the Delaware Court of Chancery seeking a preliminary injunction against consummation of the Ravert Ward Merger.

On January 26, 2012, the Court of Chancery issued an opinion granting CFI's motion for a preliminary injunction. The Court found that BTRta's decision to forego the CFI merger and enter into the Ravert Ward merger, in reliance on Article II of its certificate of incorporation, constituted a breach of the fiduciary duty owed to its shareholders. After properly considering CFI's first claim as an independent basis for granting the injunction, the Court of Chancery found it unnecessary to consider CFI's second claim regarding the defensive measures applied by BTRta.

The two claims are before this Court as a result of an interlocutory appeal entered on January 31, 2012. The Court of Chancery certified the interlocutory appeal on February 3, 2012. This Court accepted the appeal on February 10, 2012.

SUMMARY OF ARGUMENT

I. The Court of Chancery did not err in finding Article II of BTRta's certificate of incorporation to be invalid because Article II improperly eliminates the board of directors' fiduciary duties to the shareholders under *Revlon*. *Revlon* mandates that the board of directors owes a duty of loyalty and care to the shareholders of its corporation, and that in a merger, shareholders are entitled to the highest price possible per share. In addition, under Delaware law, the directors are not allowed to contract out of their fiduciary obligations to the shareholders. However, the article in question is invalid because it modifies the board's fiduciary duties in change of control transactions, resulting in lower prices for the shareholders and higher societal interests for the corporation. As a result of these violations in Article II, this Court should affirm the lower court's decision and find that Article II is invalid.

II. This Court should uphold the Court of Chancery's ruling because the board's decision to apply defensive measures to protect the Ravert Ward merger cannot withstand enhanced judicial scrutiny. BTRta's directors perceived a threat and applied defensive measures to protect a merger proposal. The board's decision to apply defensive measures deserves enhanced judicial scrutiny. In light of *Omnicare*, the board's decision was unreasonable and draconian and should be considered invalid and unenforceable. Furthermore, this Court should refuse to overrule *Omnicare* because these facts do not justify overruling its valid reasoning.

STATEMENT OF FACTS

Matthew Sunstein and Vikram Sarabhai are BTRta's founders, members of the board, and co-chief executive officers. (Op. 4.) They own all of BTRta's Class B common stock, constituting 50.4% of BTRta's voting power. (Op. 5.) The minority shareholders own Class A common stock and are directors, officers, investors, and owners of certain shares traded on the Nasdaq Stock Market¹. (Op. 6.)

In 2010, Sunstein and Sarabhai grew tired of managing BTRta as a publically held company. (Op. 7.) After addressing Sunstein and Sarabhai's concerns, BTRta's board unanimously decided to elicit bids to acquire all of BTRta's Class A and Class B shares. (Op. 7-9.) In September 2011, CFI proposed to acquire BTRta by merger at a price of \$16.50 per share. (Op. 8-9.) When informed of the CFI offer, Sunstein and Sarabhai grew immediately concerned that CFI would be unable to maintain BTRta's environmental policy, which developed under the leadership of Sunstein and Sarabhai. (Op. 9.) CFI addressed Sunstein and Sarabhai's concerns, promised them an environmental consulting role, and increased its offer to \$17 per share. *Id.* Ten days later, BTRta's board approved the CFI merger. *Id.* CFI allowed 60 days for BTRta to seek out a superior proposal. (Op. 10.)

In the days following the CFI merger agreement, Sunstein and Sarabhai's concerns regarding BTRta's environmental policy resurfaced. *Id.* Relying on Article II of BTRta's certificate of incorporation, Sunstein and Sarabhai sought out a superior proposal. *Id.* Article II, adopted in 1997, provides, in part, that "a [d]irector shall

¹The price per share was \$13 to \$14 before this litigation began.

consider the long-term prospects and interests of the [c]ompany and its stockholders, and the social, economic, legal, or other effects of any action . . . ", and that "any [d]irector is entitled to rely upon the definition of 'best interests' . . . , and such reliance shall not be construed as a breach of a [d]irector's fiduciary duty, even in the context of a Change in Control Transaction" (Op. 6.)

Before CFI's 60-day window to obtain a superior proposal closed, Ravert Ward, a buy-out firm, offered BTRta \$15.50 per share for BTRta's stock. (Op. 11.) This price was considerably less than the price offered by CFI, but Ravert Ward assured that BTRta's operations would continue to be managed in accordance with BTRta's environmental policy. *Id.* Sunstein and Sarabhai were again offered environmental consulting roles. *Id.* Ravert Ward insisted that: (1) Sunstein and Sarabhai agree to vote all of their Class B shares in favor of the merger; (2) the merger agreement be subject to a vote of BTRta's shareholders as soon as practicable; (3) BTRta would not be permitted to solicit any competing merger proposals prior to the stockholder vote; and (4) BTRta pay Ravert Ward a termination fee. (Op. 12.)

On December 13, 2011, BTRta's board approved the Ravert Ward merger agreement, declaring it a superior proposal, and concluded that Ravert Ward was more likely to continue BTRta's environmentally responsible practices. *Id.* Sunstein and Sarabhai executed their voting agreements immediately following the board's decision. *Id.* BTRta informed CFI of the Ravert Ward merger later that day, and this litigation ensued. (Op. 13.)

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE DECISION OF THE COURT OF CHANCERY BECAUSE ARTICLE II OF BTRTA'S CERTIFICATE OF INCORPORATION VIOLATES REVLON'S MANDATE AND DELAWARE CORPORATE LAW, AND IS THEREFORE INVALID.

Question Presented

Did the Court of Chancery err in finding that the disputed article is invalid, where that article improperly eliminates the board of directors' underlying fiduciary duties to the corporation and to its shareholders, and where it violates several provisions of the Delaware General Corporation Law?

Standard of Review

This case comes before the Supreme Court of Delaware on appeal from a Court of Chancery decision regarding the validity of an article in a corporation's certificate of incorporation. (Mem. Op, *Consol. Forest Indus. Co. v. BTRta Forest Prods., Inc.*, C.A. No. 6943-CJ, Jan. 26, 2012.) This Court must determine whether the lower court erred as a matter of law in formulating or applying legal principles. The standard of review is *de novo*. *Del. Ins. Guar. Assoc. v. Christiana Care Health Servs., Inc.*, 829 A.2d 1073, 1076 (Del. 2006).

Merits of Argument

The disputed article is invalid under *Revlon's* mandate and Delaware law. Although shareholders are the owners of a corporation, this Court recognizes that the Delaware General Corporation Law vests the board with the authority to make business decisions. *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 41-42 (Del. 1994). In discharging this authority, the directors owe fiduciary duties of care and loyalty to the corporation and to its shareholders. *Guth v.*

Loft, Inc., 5 A.2d 503, 510 (Del. 1939). Therefore, corporate directors have a fiduciary obligation to act in the best interest of the corporation's stockholders. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985).

Article II in BTRta's certificate of incorporation states that "a [d]irector shall consider the long-term prospects and interests of the [c]ompany and its stockholders, and the social, economic, legal, or other effects of any action . . . ", and that "any [d]irector is entitled to rely upon the definition of 'best interests' . . . , and such reliance shall not be construed as a breach of a [d]irector's fiduciary duty" (Op. 6.)

However, this article in the certificate of incorporation is invalid for two reasons. First, it eliminates the board of directors' fiduciary duties to the shareholders of the corporation under *Revlon's* mandate. Second, it violates several provisions of the Delaware General Corporation Law.

For these reasons, this Court should affirm the Court of Chancery's decision and find that Article II in BTRta's certificate of incorporation is invalid under *Revlon* and Delaware law. The scope of the board of directors' authority is discussed first, followed by the various Delaware General Corporation Law violations.

A. Article II of BTRta's certificate of incorporation is invalid because it eliminates the directors' fiduciary duties to the shareholders under *Revlon*.

Article II plainly violates *Revlon's* mandate, and is therefore invalid because it permits the directors to accept a lower cash merger proposal, based on considerations of interests of "the communities and

society in which company or its subsidiaries operate.” (Op. 14.) The “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 corporate enterprise but to sell it to the highest bidder.” *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986).

Directors owe a duty of loyalty to the corporation, and this duty is a companion obligation to the duty of care. R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, *DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS* § 4.16 (Vol. 1, 2012). These duties are based on the fact that the directors are duty-bound to the true owners of the corporation, the stockholders. *Id.* Notwithstanding true ownership, stockholders of large corporations are virtually powerless in the control of the corporate operations. *Id.* In other words, a stockholder must trust the directors to protect his or her investment by their direction of the corporation's management. *Id.* Thus, the directors are charged with a duty of loyalty to fulfill this obligation. *Id.*

The duty of loyalty both forbids directors to “stand on both sides” of a transaction and prohibits them from deriving “any personal benefit through self-dealing.” *Id.* In effect, it mandates that a director cannot consider or represent any interests other than the best interests of the corporation and its stockholders in making a business decision. *Id.*

Revlon further establishes the fiduciary duties that a board owes to its shareholders, and is thus, a core element of Delaware law. *Revlon*, 506 A.2d at 179. Under *Revlon*, in discharging the duties to

manage the business and affairs of a corporation, the directors owe fiduciary duties of care and loyalty to the corporation and to its shareholders. *Id.* These principles in *Revlon* are the foundation of the law regarding takeovers and apply with equal force when a board of directors approves a corporate merger. *Id.* at 182. *Revlon* emphasizes that the board must perform its fiduciary duties in the service of a specific objective: maximizing the sale price of the enterprise. *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001).

This Court in *Revlon* held that when a sale of the corporation becomes inevitable, the directors' role remains an active one to obtain the highest price possible for the stockholders' benefit. *Revlon*, 506 A.2d at 182. A corporation's purpose is to maximize the value of the company's shares, while still being subject to the limitation that the corporation must meet all of its legal obligations to the others who are affected by it. *In re Massey Energy Co.*, CA. No. 5430-VCS, 2011 Del. Ch. LEXIS 83, at *74 (Del. Ch. May 31, 2011). The duty of loyalty requires directors to attempt to manage the corporation within the law, with due care, and in a way intended to maximize the long-run interests of the shareholders. *Id.* at *75-76.

Additionally, this Court in *Omnicare* held that when a board of directors decides to enter into a merger transaction that will result in a change of control, enhanced judicial scrutiny under *Revlon* is the standard of review. *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 928 (Del. 2003). In *Omnicare*, the deal protection devices that were adopted by the target corporation's board of directors, as to a proposed merger, completely prevented the board from discharging its

fiduciary responsibilities to the minority stockholders when another potential acquirer presented its superior transaction. *Id.* at 930. Thus, this Court held that eliminating the fiduciary duties that the board owes to its shareholders is invalid because the stockholders of a Delaware corporation are entitled to rely upon the board of directors to discharge its fiduciary duties at all times. *Id.*

This Court in *Unocal* held that the power of a board of directors to act on behalf of a corporation derives from a fundamental duty and obligation to protect the corporate enterprise, including the shareholders, from harm that is reasonably perceived. *Unocal*, 493 A.2d at 954. This Court also held that a board of directors addressing a pending takeover bid has an obligation to determine whether the offer is in the best interest of the corporation and its shareholders. *Id.* Thus, corporate directors have a fiduciary duty to act in the best interest of the corporation's stockholders and this duty extends to protecting the corporation and its owners from perceived harm whether a threat originates from third parties or other shareholders. *Id.*

Further, this Court in *Paramount* held that the unremitting obligation of a boards' fiduciary duties extends equally to board conduct in a sale of corporate control. *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 43 (Del 1993). In the sale of control context, the directors must focus on one primary objective - to secure the transaction that is offering the best value that is reasonably available for the stockholders - and they must exercise their fiduciary duties to further that end. *Id.* at 44. This Court also

held that provisions in the certificate of incorporation cannot validly define or limit the directors' fiduciary duties under Delaware law or prevent the directors from carrying out their fiduciary duties under Delaware law. *Id.* at 42. To the extent that such provisions are inconsistent with directors' duties of loyalty and care, they are invalid and unenforceable. *Id.* This means that a contract, or a provision of a contract, that allows a board to limit the exercise of its fiduciary duties is invalid, and therefore, unenforceable. *Id.*

In this case, the directors had a provision in the certificate of incorporation that allowed them to eliminate their fiduciary duties to the shareholders. (Op. 6.) The board then tried to merge the corporation with a company that offered a lower cash price per share to the shareholders, but that promised to maintain the societal interests of the corporation. (Op. 11.) Like this Court's decision in *Revlon*, the directors had a duty to maximize the sale price of the corporation and to maximize the long-term interests of the shareholders. Therefore, like *In re Massey*, the board of the target corporation agreed to an unfair price in the merger because it did not allow the shareholders to obtain the highest price per share that was offered.

In addition, like *Omnicare*, Article II in this case allowed the directors to sell the corporation to the lowest bidder, therefore violating the duty of loyalty to the shareholders. Because this constituted a breach of the directors' fiduciary duties, the provision in the articles that improperly eliminated the board's duty is invalid. Also, like this Court's decision in *Paramount*, the directors

were not allowed to use a provision in the certificate of incorporation to eliminate their fiduciary duties under Delaware law. The use of such a provision in the articles to limit directors' fiduciary obligations is invalid and unenforceable. Accordingly, this article provision, that allowed them to eliminate their fiduciary duties to the shareholders, is invalid under *Revlon*.

For these reasons, this Court should affirm the Court of Chancery's decision and find that Article II in the certificate of incorporation is invalid.

B. Article II of BTRta's certificate of incorporation is invalid because it violates the Delaware General Corporation Law.

Article II of BTRta's certificate of incorporation is invalid because it violates provisions of the Delaware General Corporation Law. Section 102(b)(1) of the Delaware General Corporation Law states that the certificate of incorporation may contain any provision for the management of the business. Del. Code Ann. tit. 8, § 102(b)(1) (2011). It further states that it may contain any provision that limits and regulates the powers of the corporation, the directors, and the stockholders, as long as such provision is not contrary to the Delaware state laws. *Id.*

Conversely, section 102(b)(7) states that the certificate of incorporation may contain a provision eliminating the personal liability of a director to its stockholders for monetary damages for breach of fiduciary duty as a director. Del. Code Ann. tit. 8, § 102(b)(7) (2011). However, § 102(b)(7) further states that the provision is not allowed to eliminate the liability of a director for any breach of the directors' duty of loyalty to the stockholders, or

for any transaction where the directors received an improper personal benefit. *Id.* Section 102(b)(7) does not allow any alteration or modification of the duty of care, whether there is a complete elimination of the underlying duty, even by charter provision, to permit the directors to promote broader societal interests at the expense of the stockholders' interests. (Op. 15-16.)

The purpose of Del. § 102(b)(7) is to permit shareholders, who are entitled to rely upon directors to discharge their fiduciary duties at all times, to adopt a provision in the certificate of incorporation to absolve directors from any personal liability for the payment of monetary damages for breaches of their duty of care, but not for duty of loyalty violations, good faith violations, and certain other conduct. *Emerald Partners v. Berlin*, 787 A.2d 85, 90 (Del. 2001). One of the primary purposes of § 102(b)(7) is to encourage directors to undertake risky, but potentially value-maximizing, business strategies, as long as they do so in good faith. *Prod. Res. Grp., LLC v. NCT Grp., Inc.*, 863 A.2d 772, 777 (Del. Ch. 2004).

Under Delaware law, to demonstrate that a board has breached its duty of loyalty, a plaintiff must show that the directors engaged in "self-dealing." See *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983). Accordingly, if the board decision is tainted by self-interest, then the board's decision is subject to close scrutiny on the merits. In such case, the burden is then on the board to prove that the challenged transaction meets the requirement of "entire fairness" to the company and its stockholders. *Id.*

In this case, the board of directors breached its duty to the shareholders. It is well established that self-dealing is a breach of a board's duty of loyalty to its shareholders. With that in mind, the boards' decision in this case involved self-dealing because the two members on the board would benefit from merging the corporation for a lower price per share, in order to maintain the societal interests of the corporation. (Op. 12.) This means that they would still have an interest in the remaining corporation, while the shareholders would not. As a result, because the board of directors were involved in self-dealing, they breached their fiduciary duties to their shareholders. Therefore, this transaction does not meet the standard of entire fairness to the corporation or to the stockholders.

Further, like *Production Resources*, one of the purposes of § 102(b)(7) is to encourage directors to undertake risky, but potentially value-maximizing, business strategies. However, in this case, the directors altered their duty of care in Article II in order to under-value their business. (Op. 6.) In effect, this alteration of the articles is contrary to the laws of Delaware within the meaning of § 102(b)(1). The directors relied on § 102(b)(7) to eliminate their entire fiduciary obligations to the shareholders, which is an incorrect interpretation of the statute. And, this is not the type of care that should have been taken in conducting this change of control transaction.

For these reasons, this Court should affirm the decision of the Court of Chancery and find that Article II is invalid because it is in violation of Delaware law.

II. ALTERNATIVELY, THIS COURT SHOULD UPHOLD THE DECISION OF THE COURT OF CHANCERY BECAUSE, IN LIGHT OF OMNICARE, THE DEFENSIVE MEASURES TAKEN TO PROTECT THE RAVERT WARD MERGER ARE INVALID AND UNENFORCEABLE.

Question Presented

In light of *Omnicare*, can the defensive measures taken to protect the Ravert Ward merger withstand enhanced judicial scrutiny, or should *Omnicare* be overruled?

Scope of Review

The facts related to this interlocutory appeal from the decision of the Court of Chancery are undisputed. (Op. 3.) When "facts material to claims are uncontroverted, the issues presented are all essentially questions of law that this Court reviews *de novo*." *B.F. Rich & Co., Inc. v. Gray*, 933 A.2d 1231, 1241 (Del. 2007).

Merits of Argument

The facts of the present case are undisputed, and the Appellant concedes that the board's decisions are virtually identical to what this Court invalidated in *Omnicare*. (Op. 3.) Therefore, following *Omnicare*, this Court should uphold the decision of the Court of Chancery because the defensive measures taken by the BTRta board cannot withstand judicial review. In light of *Omnicare*, the board's decision to apply defensive measures was unreasonable and draconian and should be considered invalid and unenforceable. This Court should refuse to overrule *Omnicare* because these facts do not justify overruling its valid reasoning.

A. In light of *Omnicare*, the board's decision to apply defensive measures cannot withstand enhanced judicial scrutiny.

The BTRta board's decision to apply defensive measures cannot withstand *Unocal* enhanced judicial scrutiny. Like in *Omnicare*, the board's decision was unreasonable and draconian, thus, invalid and unenforceable.

This Court should apply enhanced judicial scrutiny, not the business judgment rule, when reviewing the BTRta board's decision. The business judgment rule is a "presumption that in making a business decision the directors . . . acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1373 (Del. 1995) (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)). When conflicts of interest are present, however, circumstances "mandate that a court take a more direct and active role in overseeing the decisions made and actions taken by directors. In these situations, a court subjects the directors' conduct to enhanced scrutiny to ensure that it is reasonable," "before the protections of the business judgment rule may be conferred." *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d at 42; *Unocal*, 493 A.2d at 954.

Enhanced judicial scrutiny is required because BTRta used defensive measures. When lock-ups, no-shop clauses, or other similar defensive devices are applied, enhanced judicial scrutiny is mandatory. *Unitrin*, 651 A.2d at 1372. A "lock-up" agreement typically accompanies a merger agreement and is generally viewed as an arrangement by which the target corporation in a contested takeover gives one proposed acquirer a competitive advantage over other bidders

or prospective bidders. *Note: Lock-up Options: Toward a State Law Standard*, 96 HARV. L. REV. 1068 (1983). No-shop clauses are also frequently used by parties engaged in merger negotiations, to prevent third-party bidders from intervening in such negotiations. SIMON M. LORNE, ACQUISITIONS AND MERGERS: NEGOTIATED AND CONTESTED TRANSACTIONS 2:23 (2003). Defensive devices do not necessarily violate Delaware General Corporation Law. *Id.* Instead, they are subject to enhanced judicial scrutiny when the record reflects that a board of directors took defensive measures in response to a perceived threat to corporate policy and effectiveness, which touches upon issues of control. *Omnicare, Inc.*, 818 A.2d at 930; *Paramount Commc'ns, Inc. v. Time, Inc.*, 571 A.2d 1140, 1150 (Del. 1989); *In re Sea-Land Corp., S'holder Litig.*, 642 A.2d 792, 794 (Del. Ch. 1993), *judgment aff'd*, 633 A.2d 371 (Del. 1993). When a board applies defensive measures, the board receives the protection of the business judgment rule only after the board's actions pass *Unocal's* enhanced judicial scrutiny. *Unocal*, 493 A.2d 946 (Del. 1985).

The BTRta board's actions cannot withstand *Unocal* scrutiny. The *Unocal* test is two-pronged. *Id.* The first prong is a reasonableness test, which is only satisfied if directors can demonstrate that they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed. *Id.* The second prong is a proportionality test, and it is only satisfied upon a showing that the directors' defensive response was reasonable in relation to the threat posed. *Id.* It is "not until both parts of the *Unocal* inquiry have been satisfied that the business judgment rule attaches to defensive

actions of a board of directors." *Paramount Commc'ns, Inc. v. Time, Inc.*, 571 A.2d at 1154. The ultimate question in applying the *Unocal* standard is: what deference should the reviewing court give "to the decisions of directors in defending against a takeover?" E. Norman Veasey, *The New Incarnation of the Business Judgment Rule in Takeover Defenses*, 11 DEL. J. CORP. L. 503, 504-05 (1986).

In *Omnicare*, this Court applied *Unocal's* enhanced judicial scrutiny to a target board's decision to adopt two defensive measures the acquirer requested: (1) to include a voting trust in which the two major shareholders agreed to vote for the merger; and (2) to omit a "fiduciary out" clause, the board agreed not to consider other merger offers and to put the merger to a shareholder vote. *Omnicare*, 818 A.2d at 930. Once the lock-up agreement was in place, the target was unable to accept a better offer from a second suitor. *Id.* In applying the *Unocal* scrutiny to the defensive measures, this Court held that the stockholder voting agreements, combined with the lack of a fiduciary out clause and the inclusion of a § 251(c) clause, locked up the target corporation and were preclusive and coercive. *Id.* This Court held that they were preclusive and coercive in the sense that they accomplished a *fait accompli*; without a fiduciary out clause, it was mathematically impossible for the target corporation to accept a better offer from another potential suitor. *Id.* Before holding that the defensive devices were invalid and unenforceable, this Court concluded that the defensive devices were not within a reasonable range of responses to the perceived threat, which was losing the acquiring corporation's offer. *Id.*

In this case, the Appellant concedes that its actions were virtually identical to the board's actions in *Omnicare*. (Op. 3.) BTRta's directors executed the merger agreement with Ravert Ward after perceiving a pending merger with CFI, Inc. as a potential threat to BTRta's environmentally responsible practices. (Op. 11.) The merger agreement prescribed a change in the control of BTRta. *Id.* A subsequent agreement accompanied the Ravert Ward merger proposal. (Op. 12.) It involved a majority shareholder voting agreement, an agreement to conduct a shareholder vote, an agreement to refrain from accepting competing merger proposals prior to the required shareholder vote, and a termination fee of \$15 million. *Id.*

Enhanced judicial scrutiny is necessary in this case because the agreement accompanying the Ravert Ward merger is a defensive lock-up, no-shop agreement: (1) the agreement was executed in response to the perceived threat; (2) Ravert Ward gained a competitive advantage once the agreement was in place; and (3) BTRta agreed not to solicit merger proposals from other companies. The board's actions cannot withstand judicial scrutiny for two reasons.

1. Reasonable grounds for perceiving danger to corporate policy fail to exist.

The BTRta board's decision to apply the lock-up, no-shop agreement cannot withstand *Unocal* scrutiny because BTRta cannot show that reasonable grounds for perceiving danger to the corporate policy existed.

BTRta's board cannot make an affirmative showing, because, in Delaware, this is only satisfied by the presence of a majority of outside independent directors, actively participating in a reasonable

investigation resulting in a good faith review of adequate information. *Unocal*, 493 A.2d at 955. It is not satisfied when "independence" is compromised and the decision-making process is dominated by an inside director. *Id.* An "outside" director has been defined as a non-employee and non-management director. See *Grobow v. Perot*, 539 A.2d 180, 184 n.1 (Del. 1988). Independence "means that a director's decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences." *Id.*

The following facts indicate that the board's defensive response to the perceived threat was dominated by Sunstein and Sarabhai:

- There are nine directors on the board of BTRta. Two directors, Sunstein and Sarabhai, are inside directors while the other seven directors are outside, independent directors. (Op. 6.)
- When faced with the initial proposal from CFI, it was Sunstein and Sarabhai who perceived a threat to environmental policy. (Op. 9.) Their immediate concerns were quelled when CFI informed Sunstein and Sarabhai that they would be consulted on any significant changes to environmental policy. (Op. 10.) Days later, Sunstein and Sarabhai agreed to the CFI merger on October 17, 2011. *Id.*
- Sunstein and Sarabhai later changed their mind and their perceived threats arose again. (Op. 11.) Nothing from the record indicates that other board members shared in the perceived threats. (See Op. 9-13.)

- Sunstein and Sarabhai sought out the second merger proposal, and the board approved the Ravert Ward proposal upon their recommendation. (Op. 12.) The Ravert Ward agreement provided Sunstein and Sarabhai with an environmental consulting role. *Id.*

At all relevant times, Sunstein and Sarabhai, inside directors, perceived the threats and dominated the negotiations. The seven outside directors merely reacted to the concerns of Sunstein and Sarabhai, the founders and creators of BTRta and its environmentally responsible practices. A reasonable investigation was never performed and information was never requested nor reviewed. As a result of both mergers, Sunstein and Sarabhai would have active consulting roles in changes made to environmental policy. If a threat existed, Sunstein and Sarabhai, as consultants, would be in positions to extinguish the threat. Because the BTRta board's decision lacked "independence" and a reasonable investigation as identified in *Unocal*, the BTRta board will be unable to affirmatively show that a reasonable threat to corporate policy existed.

For these reasons, this Court should refuse to find that BTRta's board had reasonable grounds for perceiving a threat to corporate policy. Therefore, the decision to apply defensive measures cannot withstand enhanced judicial scrutiny.

2. The measures taken were draconian and disproportionate to the threat perceived.

The BTRta board's decision cannot withstand *Unocal* scrutiny because the measures taken were draconian and disproportionate to the

threat perceived. Therefore, this Court should find that the measures taken were invalid and unenforceable.

The BTRta board will be unable to satisfy the proportionality aspect of the *Unocal* burden, requiring a board to demonstrate the proportionality of its response to the threat merger proposal posed. *Unitrin*, 651 A.2d at 1374. The key inquiry is whether the board of directors' defensive measures against a takeover are draconian in the sense of being preclusive or coercive. *Id.* In Delaware, a defensive measure is preclusive, if it makes a bidder's ability to wage a successful proxy contest and gain control either mathematically impossible or realistically unattainable. *Id.* It is coercive when it operates to force management's preferred alternative upon the stockholders. *Id.* If defensive measures are either preclusive or coercive, they are draconian and impermissible. *Id.*

In this case, the defensive measures applied by BTRta's board were both preclusive and coercive. Similar to *Omnicare*, the BTRta board protected the Ravert Ward merger with a majority shareholder voting agreement and an agreement not to solicit any competing merger proposal prior to a vote of the shareholders. *Omnicare*, 818 A.2d at 930. Also like in *Omnicare*, the board failed to include an effective fiduciary out clause, which rendered the BTRta board unable to accept any additional proposal involving an increased benefit or value to its shareholders. *Id.* This Court, in *Omnicare*, held that this type of lock-up, or combination of defensive measures, is preclusive and coercive because it is designed to coerce the consummation of a merger proposal and preclude the consideration of any superior transaction.

Id. With the voting agreement in place, it becomes "realistically unattainable" and "mathematically impossible" for BTRA's minority shareholders to defeat the 50.4% of shares to be voted by Sunstein and Sarabhai. BTRA's minority shareholders have no option but to accept the Ravert Ward merger proposal and are precluded from considering subsequent proposals.

For these reasons, this Court should consider the defensive measures as preclusive and coercive, and thus, invalid and unenforceable. Accordingly, this Court should uphold the decision of the Court of Chancery.

B. *Omnicare* uses valid reasoning and should not be overruled by the facts of this case.

This Court should refuse to overrule *Omnicare*. *Omnicare* accurately uses reasoning supported by a body of relevant Delaware law. Furthermore, the facts of this case do not justify overturning its valid reasoning.

This Court should follow the majority's reasoning in *Omnicare*, refusing to give any weight to the questions presented by the dissent. The dissent in *Omnicare* considered the majority's holding a new rule of law which can be stated as follows: A merger agreement entered into after a market search, before any prospect of a topping bid has emerged, which locks up stockholder approval and does not contain a "fiduciary out" provision, is per se invalid when a later significant topping bid emerges. *Omnicare*, 818 A.2d at 939 (Veasey, C.J. dissenting). Only a few courts have given weight to the dissent's considerations. See *In re Toys "R" Us, Inc., S'holder Litig.*, 877 A.2d 975, 979 (Del. Ch. 2005) (citing the dissenting opinions and

reasoning that *Omnicare* represents an aberrational departure from the long accepted principle that what matters is whether the board acted reasonably in light of all the circumstances).

The facts of this case require a finding that would be supported by the *Omnicare* majority and dissent. The dissent's main argument is that a bright-line rule fails to account for factually "compelling circumstances" which affect a target board's good faith decision at the exact moment the decision is made. *Omnicare*, 818 A.2d at 939 (Veasey, C.J. dissenting). The dissent argued that the target company's decision in *Omnicare*, to use defensive measures, was justified because the measures were adopted to protect the only existing offer at that time, or the "only game in town." *Id.* The dissent reasoned that lock-ups cannot be reviewed in a vacuum and that a court should review the entire bidding process to determine whether a board's actions are justified. It noted that any bright-line rule prohibiting lock-ups could, in certain circumstances, "chill otherwise permissible conduct." *Id.* at 940.

This Court should rely on the reasoning in *QVC*, which is supported by both the majority and the dissent. Before concluding, the dissent attempted to question the majority's reliance on *QVC*. *Id.* In that case, the target board did not canvass the market, and negotiated exclusively with one suitor despite another suitor's announced interest. *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d at 42. The target board refused to give the interested suitor an opportunity to top the existing suitor's offer. *Id.* The target board shunned the interested suitor's higher offer and locked-up a

deal with the existing suitor's less valuable offer. *Id.* The *Omnicare* majority used the reasoning in that case to reach its ultimate conclusion. *Omnicare*, 818 A.2d at 930. The dissent argued, noting the distinct factual differences between *QVC* and *Omnicare*, that *QVC* should not have been relied upon because, at the time defensive measures were applied in *Omnicare*, there was only one existing potential suitor. *Id.* at 941 (Veasey, C.J. dissenting).

The disputes with the *Omnicare* holding are with the majority's conclusion, not with its reasoning. See *Id.* Using the reasoning in *Omnicare* without relying on the majority's conclusion, this Court should still find that BTRta's board's decision to apply defensive measures cannot withstand *Unocal*'s enhanced judicial scrutiny. The facts of this case are notably different from *Omnicare* and more like the facts in *QVC*. Like in *QVC*, when BTRta's board decided to apply defensive measures, it had an existing offer from CFI. The directors made the decision to abandon the CFI merger and agree defensively to enter into the agreement with Ravert Ward. *Unitrin*'s "coercive and preclusive" factors are more evident in this case than in *Omnicare*. The defensive measures taken were taken in defense of a "perceived" hostile takeover, and Ravert Ward was not, at any point in time, the "only game in town." Ravert Ward was simply the game the BTRta board wished to play the most.

Following *In re Toys "R" Us*, this Court should conclude that BTRta's board took unreasonable measures in light of the perceived threats or circumstances BTRta faced. The threat to environmental policy is simply not the same as the threat existing in *Omnicare*,

which is the possibility of completely losing the opportunity to merge. This Court should not use these sets of facts (where the only perceived threat to BTRta was the possibility of being owned by CFI, a corporation who may or may not have been able to provide an adequate level of environmental focus in the eyes of Sunstein and Sarabhai, inside directors and majority shareholders) to overrule *Omnicare*. *Omnicare* used appropriate reasoning, regardless of whether or not its ultimate conclusion applies in every factual setting.

For these reasons, this Court should rely on the reasoning in *Omnicare*, along with the entire body of relevant Delaware law, and uphold the Court of Chancery's decision because the defensive measures applied by BTRta's board cannot withstand enhanced judicial scrutiny.

CONCLUSION

Article II is in clear violation of the board's fiduciary duties to its shareholders under *Revlon*, and it violates Delaware General Corporation Law. Alternatively, the directors' decision to protect the Ravert Ward merger with defensive measures cannot withstand enhanced judicial scrutiny because it is unreasonable and draconian. The board's decision should be considered invalid and unenforceable in light of *Omnicare*. Furthermore, *Omnicare* remains valid law and should not be overturned. For these reasons, this Court should uphold the decision of the Court of Chancery.

Respectfully submitted,

/s/ Team V
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