

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CONSOLIDATED FOREST INDUSTRIES CO., :
a Delaware corporation, :

Plaintiff, :

v. :

C.A. No. 6943-CJ

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., :

Defendants. :

MEMORANDUM OPINION

Date Submitted: January 23, 2012

Date Decided: January 26, 2012

Alison Barry, Esquire, Kenneth J. Lafferty, Esquire, and David C. Collins, Esquire, of Young & Grant, P.A., Wilmington, Delaware, Attorneys for Plaintiff.

Raymond J. Friedlander, Esquire, Anne C. Proctor, Esquire, and David A. Holzman, Esquire, of Slate, Potter, Morris, & Richards, LLP, Wilmington, Delaware, Attorneys for Defendants.

JEUELL, Chancellor

I. INTRODUCTION

Plaintiff Consolidated Forest Industries Co. (“CFI”) owns 4,300 shares of common stock of defendant BTRta Forest Products, Inc. (“BTRta”), a Delaware corporation. Plaintiff seeks a preliminary injunction against consummation of the merger of BTRta and BTR Acquisition Corp., a wholly-owned subsidiary of Ravert Ward, L.P., a Delaware limited partnership (“Ravert Ward”).¹

Plaintiff’s claim rests on the uncontested fact that the board of directors of BTRta has accepted – and made essentially a foregone conclusion of – a merger proposal that offers BTRta stockholders less cash per share than a merger agreement with CFI that BTRta’s board had originally approved. In plaintiff’s view – and in mine as well, as explained below -- BTRta’s board of directors has engaged in a clear violation of the teachings of the Delaware Supreme Court in *Revlon*² and *Omnicare*³.

Notably, this case does not involve any suggestion of financial self-dealing on the part of any of the defendants. The two founders and directors of BTRta, Matthew Sunstein and Vikram Sarabhai, are significant stockholders of BTRta, and are receiving the same price per share for their BTRta shares as BTRta’s public stockholders. While they will both be retained after the merger by the surviving company as consultants, their compensation as such is expected to be less than what they were to receive as consultants following the originally proposed merger with CFI. In short, nothing in their support of the Ravert Ward merger appears to be motivated by their financial self-interest.

¹ Ravert Ward and its acquisition subsidiary have agreed that their interests at this stage of the proceedings are adequately represented by the other defendants, and they have not participated in the argument and briefing on the pending motion for preliminary injunction.

² *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

³ *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914 (Del. 2003).

On the other hand, the critical aspect of the BTRta directors' decision to terminate the CFI merger agreement and enter into the merger agreement with Ravert Ward was the board's determination that the merger with Ravert Ward would better serve the goals of environmental sustainability and good corporate citizenship that BTRta's founders have long espoused and continue to seek to serve. According to defendants, and as distinct from *Revlon*, such goals were and are permissible considerations because BTRta's certificate of incorporation explicitly adopts them and permits directors to take them into account in governing the corporation.

Defendants' response to plaintiff's *Omnicare* claim is more legal than factual: although defendants necessarily concede that the structure of approvals for the Ravert Ward merger agreement is virtually identical to what the Delaware Supreme Court invalidated in *Omnicare*, their central argument is that *Omnicare* was incorrectly decided and that it should be overruled. For the reasons set forth below, however, I cannot accept defendants' assertions on either aspect of the case, and will enter an order preliminarily enjoining the Ravert Ward merger.

II. FACTUAL BACKGROUND⁴

A. The Parties

Plaintiff CFI is a Delaware corporation headquartered in Boise, Idaho, with operations throughout the United States, Canada, Brazil, Indonesia, and Central America. Through acquisitions of smaller forest products companies, it has become one of the world's largest producers of paper and wood products. CFI's common stock trades on the New York Stock Exchange.

⁴ The facts recited here are uncontested. It was not necessary for me to resolve any issues of material fact in deciding the pending motion for preliminary injunction.

Defendant BTRta has its principal place of business in Portland, Maine, and its forest product operations have expanded from the eastern United States and Canada to Central and South America, Southeast Asia, and central Africa. Its products include specialty papers, specialty chemicals derived from trees, and sustainably harvested lumber. Defendants Matthew Sunstein and Vikram Sarabhai are the founders, and are currently members of the board of directors, of BTRta. They have also served as co-chief executive officers of BTRta since its founding. Defendants Michael F. Allen, Miles D. Liu, Kathleen L. Todman, Janice L. Stern, Herbert P. McCusker, Paula R. Abazian, and William D. Hemphill are independent members of the board of directors of BTRta, and they own in the aggregate 2,154,687 shares of Class A Common Stock of BTRta.

Defendant Ravert Ward, based in Haverhill, Massachusetts, is described as a boutique acquisition firm, specializing in arranging private acquisitions of smaller public companies. Defendant BTR Acquisition Corp. is the acquisition company established by Ravert Ward for purposes of the challenged merger with BTRta.

B. BTRta's History and Corporate Governance

Defendants Matthew Sunstein and Vikram Sarabhai met in 1983 while they were studying at the Massachusetts Institute of Technology. They shared a passion for both engineering and environmentalism, and decided to apply their talents after graduating from MIT in 1985 to creating a business that would manufacture and sell forest products using sustainably harvested trees and otherwise minimizing adverse environmental impact of production. Among the processes developed by Sunstein and Sarabhai was a technique for producing paper without using chlorine-based bleaching agents.

BTRta is the company that Sunstein and Sarabhai formed in 1987.⁵ During its initial growth period, BTRta financed its expansion primarily through bank loans and equity infusions from family and friends. In 1997, however, Sunstein and Sarabhai sought out a substantial equity infusion, and the venture capital firm Cedar Street Partners, LLP acquired shares of a newly created class of preferred stock of BTRta in October, 1997, in exchange for a cash investment of \$15 million. With Cedar Street's active encouragement, BTRta engaged in an initial public offering of Class A Common Stock in late 2000.⁶ Those shares have traded on the Nasdaq Stock Market, in the range of \$13 to \$14 per share before the events giving rise to this litigation.

BTRta's certificate of incorporation provides for two classes of common stock, Class A and Class B, of which 25,267,042 shares of Class A common stock and 2,567,304 shares of Class B common stock were outstanding as of December 31, 2011. The Class A and Class B common stock have identical rights, except that the Class B Common Stock is entitled to ten votes per share in all matters on which the common stock votes, while the Class A Common Stock carries only one vote per share. Except as required by law, the shares of Class A and Class B Common Stock vote together as a single class.

All of the Class B Common Stock is owned by Sunstein and Sarabhai and members of their families, and it currently constitutes about 50.4% of the voting power of

⁵ The name BTRta refers to concepts from Sunstein's and Sarabhai's respective religious traditions: *bal taschit*, the concept of minimizing environmental damage reflected in the Biblical precept "do not destroy," referring to avoiding destruction of fruit-producing trees during a military siege (Deut. 20:19-20), and Rta, the Vedic concept of natural order. According to counsel for defendants, the company's name is pronounced "Baht-ritta," with the accent on the last syllable.

⁶ In the years immediately following BTRta's initial public offering, Cedar Street Partners sold its shares of Class A Common Stock and is no longer a stockholder of BTRta.

BTRta's outstanding stock and about 9.2% of the number of outstanding shares. The next largest stockholders of BTRta (not including any of the director defendants) are six unaffiliated institutional investors each owning between 0.5% and 1.1% of BTRta's Class A Common Stock. BTRta's senior officers other than Sunstein and Sarabhai own in the aggregate 581,142 shares of Class A Common Stock. BTRta's certificate of incorporation expressly prohibits the taking of stockholder action by written consent in lieu of a meeting of stockholders.

BTRta's certificate of incorporation also contains an unusual provision that is at the core of the present controversy. Article II of BTRta's certificate of incorporation provides:

In discharging the duties of a Director, and in determining what is in the best interests of the Company and its stockholders, a Director shall consider 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, (collectively, with the stockholders, the "Stakeholders"), together with the short-term, as well as long-term, interests of its stockholders and the effect of the Company's operations (and its subsidiaries' operations) on the environment and the economy of those communities and the larger world. Nothing in this Article is intended to or shall create or grant any right in or for any person or any cause of action by or for any person. Notwithstanding the foregoing, any Director is entitled to rely upon the definition of "best interests" as set forth above in acting as a Director and in discharging the duties of a Director, and such reliance shall not be construed as a breach of a Director's fiduciary duty, even in the context of a Change in Control Transaction where, as a result of weighing other Stakeholders' interests, a Director determines to accept an offer with a lower price per share than a competing offer.

As defined elsewhere in BTRta's certificate of incorporation, a "Change in Control Transaction" includes a merger in which the Company's stock is converted into the right to receive cash. Article II was adopted in early 1997, in anticipation of seeking an equity

infusion from a venture capital firm, and long before BTRta's initial public offering.

Under the heading describing "Risk Factors" associated with the Class A Common Stock being issued, the prospectus for that offering described Article II as follows:

The certificate of incorporation includes a provision (Article II) that requires the Company's directors, in exercising their managerial authority, to consider the best interests of the Company by reference to 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 (and its subsidiaries' operations) on the environment and the economy of those communities and the larger world. This provision reflects the views of the Founders [Sunstein and Sarabhai] that the Company's operations should be conducted ethically and with a view to long-term sustainability of both the Company's operations and the environments in which the Company operates, even if stockholder value is not maximized. In addition, Article II permits the directors to rely on the foregoing definition of the Company's best interests in discharging their duties, even in the context of a sale of the company or other change of control transaction where, as a result of weighing other stakeholders' interests, the directors accept an offer with a lower price per share than a competing offer. In that context, the directors' acceptance of the lower per share offer would not, under Article II, be considered a breach of the directors' fiduciary duty. As a result, Article II may permit the Company's directors to engage in conduct and make decisions that would result in lower stockholder value than what would be permissible in the absence of the provision. The validity of Article II is uncertain, however, although the Company intends to defend the validity of the provision if it were challenged.

C. The CFI Merger Agreement

Last year, Sunstein and Sarabhai had become somewhat disenchanted with their role and responsibilities in managing BTRta as a publicly held company. At a meeting of BTRta's board of directors on April 20, 2011, Sunstein and Sarabhai discussed their concerns that public company status had been frustrating them in their efforts to attend to what they considered to be the important aspects of the business. They also suggested that they would consider addressing their concerns by either selling their BTRta stock, or

engaging in a transaction to acquire the publicly held shares of BTRta. At the April 20 meeting, and in response to these expressed concerns and suggestions, the board of directors of BTRta resolved to retain Eberhard Jefferson L.P. (“Eberhard”) as BTRta’s financial advisor to explore potential transactions, including mergers or acquisitions, to address BTRta’s situation.

After initial discussions with Eberhard, Sunstein and Sarabhai became convinced that the most desirable option for them would be to shed the responsibilities of controlling share ownership and pursue a transaction in which BTRta (and their equity interest in it) would be sold. Sunstein and Sarabhai presented that view to the board of directors at a meeting on May 18, 2011. In response to concerns expressed by several of the independent directors that any sale of BTRta should involve a sale of its publicly held shares as well as the Class B shares owned by Sunstein and Sarabhai, it was unanimously resolved by the board of directors that Eberhard should begin the process of identifying and eliciting bids to acquire the entire equity of BTRta, both the Class A and the Class B shares.

The process of identifying potential bidders proceeded quite slowly, due, according to Eberhard, to the prevailing economic situation and the uncertainties associated with financing acquisitions. By late summer, however, Eberhard had received expressions of interest from CFI in acquiring BTRta. As Eberhard was aware, CFI had been engaged in a program of forest products company acquisitions, and was logically interested in acquiring BTRta because of BTRta’s specialty papers business and its tree harvesting operations, both of which complemented other elements of CFI’s operations. In late September, 2011, CFI presented a proposal to acquire BTRta by merger at a price

of \$16.50 per BTRta share, a premium of approximately 25% over the then prevailing market price of the Class A BTRta shares.

When informed of the CFI offer, Sunstein and Sarabhai were both considerably concerned and resistant: the size of CFI's operations, and its history of logging practices, led both of them to question whether CFI would credibly commit to maintain the environmentally responsible practices that BTRta, under the leadership of Sunstein and Sarabhai, had so carefully promoted. As a result, and with Eberhard's encouragement, Sunstein and Sarabhai met on October 7, 2011 with representatives of CFI to discuss the proposed acquisition.⁷ That meeting went well: Sunstein and Sarabhai received assurances that post-merger they would serve as consultants to the Environmental Committee of CFI's board of directors, and would be consulted on any significant alteration of CFI's environmental practices in relation to the operations being acquired from BTRta. In addition, CFI offered the further inducement of increasing its offer to \$17 per share.

The BTRta board of directors met on October 17, 2011 to consider the revised CFI merger agreement. At the conclusion of the four-hour meeting, following presentations by Eberhard, Sunstein and Sarabhai, the BTRta board adopted a resolution approving the merger agreement, and later that day the merger agreement was executed on behalf of CFI, BTRta, and CFI's acquisition subsidiary. A press release announcing the deal followed later in the evening.

⁷ At a telephonically-convened meeting on September 29, 2011, the board of directors of BTRta discussed the concerns about CFI and agreed that a meeting between CFI and Sunstein and Sarabhai would be useful.

The merger agreement with CFI was quite modest in its limitations on BTRta: although BTRta was committed to present the agreement to its stockholders for a vote, it also was allowed to seek out, and terminate the merger agreement in the event of, a Superior Proposal (as defined in the merger agreement) during the 60-day period following board approval of the merger agreement. Under that agreement, a Superior Proposal included any merger proposal that BTRta's board of directors deemed in good faith would better serve the best interests of the Company (BTRta), as defined under Article II of BTRta's certificate of incorporation. In the event of such a termination, however, CFI would be entitled to a termination fee of \$15 million, or about 3.2% of the total value of the transaction.

D. The Ravert Ward Merger Agreement

Eberhard and BTRta's directors had no intention of failing to take advantage of the 60-day period for seeking and entering into a Superior Proposal. Despite their anticipated role as consultants for CFI post-merger, Sunstein and Sarabhai continued to have misgivings about working for a publicly held company and about their ability to promote the larger societal interests that BTRta had been attending to. Recognizing these concerns, Eberhard put Sunstein and Sarabhai in touch with the buy-out firm of Ravert Ward, which Eberhard knew had been involved in several private acquisitions of companies focused on corporate social responsibility. In late October, 2011, Eberhard, Sunstein, and Sarabhai met with Ravert Ward's principals to discuss the possibility of an acquisition of BTRta by Ravert Ward. Ravert Ward was only too pleased to have been invited to consider the possibility, particular to improve its reputation as a leading organizer of socially responsible corporate acquisitions. Ravert Ward was emphatic,

however, in its position that it could not finance a transaction at a price superior to what CFI had agreed to pay; to the contrary, Ravert Ward's view was that \$13 per share was the most it could offer, especially in light of CFI's ability to take advantage of economies of scale in acquiring BTRta that were unavailable to a financial acquirer like Ravert Ward. On that note, the initial meeting with Ravert Ward ended without any commitment to pursue the subject further.

In late November, 2011, however, as the 60-day termination period was drawing to a close and no Superior Proposals had been identified, Sunstein and Sarabhai asked Eberhard to go back to Ravert Ward to see if there was any flexibility on price and other terms. For whatever reason – perhaps a slight solidification of economic prospects and lower interest rates – Ravert Ward was receptive, although it made clear that any deal would have to be accomplished without delay and without further shopping by BTRta for a superior deal. In a series of meetings in early December, BTRta and Ravert Ward's representatives engaged in intensive negotiations. Ultimately, Ravert Ward agreed to offer \$15.50 per share in cash for BTRta's stock – considerably less than the CFI merger agreement's \$17 per share price, but still a premium over the pre-merger agreement price of BTRta stock. Moreover, Ravert Ward assured BTRta that BTRta's operations would continue to be managed in accordance with its previous environmentally responsible practices, and that Sunstein and Sarabhai would have an active consulting role in implementing that commitment.

In order to make these concessions, however, Ravert Ward insisted on the following:

- Sunstein and Sarabhai would be required to execute written agreements to vote all of their shares of Class B Common Stock in favor of the merger;
- Pursuant to Section 146 of the Delaware General Corporation Law, the board of directors of BTRta would be required to present the merger agreement to a vote of its stockholders as soon as practicable, and in any event on or before April 1, 2012, even if the board no longer considered the Ravert Ward merger desirable;
- BTRta would not be permitted to solicit any competing merger proposal prior to the stockholder vote on the merger.
- In the event of a termination of the merger agreement following consummation of a business combination with a person other than Ravert Ward or one of its affiliates, BTRta would be required to pay to Ravert Ward a termination fee of \$15 million.

The BTRta board of directors met on December 13, 2011 to consider the proposed Ravert Ward merger agreement. The board concluded that it was substantially more likely that BTRta's environmentally responsible practices would continue, and would even evolve to improve, following an acquisition by Ravert Ward than in the case of an acquisition by CFI. Weighing that consideration, the interests of the communities and society served by BTRta, and recognizing that the proposed Ravert Ward merger agreement still offered BTRta stockholders a premium to pre-merger market prices, the board resolved to declare the Ravert Ward merger agreement a Superior Proposal, within the meaning of the CFI merger agreement, and to approve the Ravert Ward merger agreement. Sunstein and Sarabhai also agreed to enter into the voting agreements requested by Ravert Ward, and did so shortly after the conclusion of the board meeting.

BTRta informed CFI of the Ravert Ward merger agreement later on December 13, 2011, and submitted that merger agreement to CFI at that time. The following day, in a brief telephone conversation, counsel for CFI informed counsel for BTRta that CFI objected to the Ravert Ward merger, considered it a violation of the BTRta directors' fiduciary duties, and would promptly bring suit to enjoin consummation of the merger. This action was commenced two days later, on December 16, 2011. Following limited and expedited discovery, plaintiff CFI has moved for entry of a preliminary injunction against consummation of the Ravert Ward merger. A meeting of BTRta stockholders to vote on the Ravert Ward merger agreement is now scheduled to be held on March 23, 2012. In light of the voting agreements entered into by Sunstein and Sarabhai, the results of that meeting are essentially a foregone conclusion.

III. LEGAL ANALYSIS

A. Standards for a Motion for Preliminary Injunction

The standards for evaluating a motion for a preliminary injunction are well settled in this Court. In sum, “[t]he Court may grant a preliminary injunction where the moving party demonstrates: (1) a reasonable probability of success on the merits at a final hearing; (2) an imminent threat of irreparable injury; and (3) a balancing of the equities [that] tips in its favor.”⁸ In this case, defendants concede that if plaintiff were to demonstrate a reasonable probability of success on the merits at a final hearing, a preliminary injunction would be appropriate. Accordingly, the balance of this opinion addresses that probability.

⁸ *Zrii, LLC v. Wellness Acquisition Group, Inc.*, 2009 Del. Ch. LEXIS 167, *24 n. 93 (Del. Ch. Sept. 21, 2009), citing *Argyle Solutions, Inc. v. Prof'l Sys. Corp.*, 2009 Del. Ch. LEXIS 63, 2009 WL 1204351, at *2 (Del. Ch. May 4, 2009) (citing *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1341 (Del. 1987)).

B. The Validity of Article II

Plaintiff does not contend that the defendant directors of BTRta failed in their deliberations to give effect to Article II of BTRta's certificate of incorporation.⁹ Specifically, plaintiff agrees that if that provision is valid, it permits the directors to do exactly what they did here: accept the lower of two cash merger proposals, based on considerations of the interests of "the communities and society in which the Company or its subsidiaries operate." As plaintiff points out, however, that choice plainly violates *Revlon's* mandate that ... "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."¹⁰

Defendants maintain, however, that the *Revlon* holding is not an unyielding, mandatory element of Delaware law. More particularly, they maintain that under Section 102(b)(1) of the Delaware General Corporation Law, the powers and duties of directors of a Delaware corporation can be expanded or restricted by provisions of the certificate of incorporation.¹¹ Article II, they say, is a provision that defines the powers of the directors, and is not "contrary to the laws" of Delaware within the meaning of Section 102(b)(1). According to defendants, the *Revlon* mandate is purely a creature of common law, not specified in any statute, and the directors' power to take other constituencies'

⁹ Likewise, CFI does not contend that BTRta has breached the original merger agreement with CFI.

¹⁰ *Revlon*, 506 A.2d at 182.

¹¹ 8 *Del. C.* §102(b)(1) permits the certificate of incorporation to include "[a]ny provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders, or the governing body, members, or any class or group of members of a nonstock corporation; if such provisions are not contrary to the laws of this State."

interests into account in evaluating merger proposals can be expanded by the “contract” – the certificate of incorporation – to which all stockholders are a party.

While I appreciate the logic of defendants’ point, I find it inconsistent with precedent. *Revlon* expounded a core element of Delaware corporate law, namely the fiduciary duties of directors. If one views the *Revlon* mandate as an expression of the directors’ duty of loyalty, Article II would appear to offend the analysis by then Vice Chancellor Jacobs in *Tri-Star*,¹² in which the Court found that a charter provision that could limit director liability for usurpation of a corporate opportunity would be inconsistent with Section 102(b)(7) of the Delaware General Corporation Law. Specifically, the Court in *Tri-Star* reasoned that to “eliminate or limit the liability of [] directors for breach of their fiduciary duty of loyalty - - [is] a result proscribed by §102(b)(7).”¹³ In light of that reasoning, a charter provision that would alter the directors’ fiduciary duty of loyalty in acting on a merger proposal should likewise be proscribed, where it would enable directors to act with less regard for the interests of stockholders than would otherwise be the case in the absence of the provision.

Article II fares no better in my view even if the *Revlon* mandate is viewed solely as an expression of the directors’ duty of care. Section 102(b)(7) does authorize the certificate of incorporation to eliminate or limit the directors’ liability for monetary damages for breach of the fiduciary duty of care.¹⁴ Implicitly, however, it does not

¹² *Siegman v. Tri-Star Pictures, Inc.*, 1989 Del. Ch. LEXIS 56 (Del. Ch. May 5, 1989, revised May 30, 1989).

¹³ *Id.* at *26.

¹⁴ 8 *Del. C.* §102(b)(7) permits the certificate of incorporation to include “[a] provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii)

countenance any alteration of the content of the duty of care, whether complete elimination of the underlying duty, or modifying it, even by charter provision, to permit directors to promote broader societal interests at the expense of stockholders' interests.

In sum, to the extent that Article II of BTRta's certificate of incorporation purports to enable the directors to approve a sale of the company, for cash, and forgo a merger that offers stockholders greater current value, based solely on considerations of interests of stakeholders other than stockholders, it is contrary to the laws of the State of Delaware. Accordingly, the directors of BTRta were not entitled to rely on Article II in approving the Ravert Ward merger, and their reliance on societal interests other than the interests of BTRta's stockholders constituted a breach of their fiduciary duty to those stockholders.

C. The Continuing Impact of *Omnicare*

Defendants acknowledge that the means by which they approved the Ravert Ward merger bear at least a close resemblance to the techniques invalidated by the Delaware Supreme Court in *Omnicare*. Indeed, although defendants suggest a few distinctions between this case and *Omnicare*, their principal contention in this regard is that the Court should no longer consider itself bound by *Omnicare*, because the Delaware Supreme Court would overrule that case if the opportunity were presented to do so.

Overruling an opinion of the Delaware Supreme Court is, of course, not the prerogative of this Court. Defendants may argue for overruling *Omnicare* in the context of any appeal of the order granting the requested preliminary injunction. Given this

for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit.”

Court's inability to reconsider *Omnicare*, however, and having already found an independent basis for entering that injunction, I find it unnecessary and inappropriate to engage in further consideration of plaintiff's *Omnicare* claim.

IV. CONCLUSION

For the foregoing reasons, plaintiff's motion for a preliminary injunction is granted, and an appropriate order will be entered upon notice.

s/ Meghan Jeuell
Chancellor