IN THE SUPREME COURT OF THE STATE OF DELAWARE

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<tr><td>PRAISE VIDEO, INC., a Delaware corporation, JACOB BISSINGER, FRANCIS PENNOCK, MARK VAN ZANDT, HOWARD METCALF, PETER HORNBERGER, NEW HOPE PUBLISHING CO., AND PRAISE NEW HOPE CORP.,

Defendants Below,
Appellants,

v.

MERCER CHRISTIAN PUBLISHING CO. and SUSAN BEARD,

Plaintiffs Below,
Appellees.</td><td>No. 43, 2014

Court Below: The Court of Chancery of the State of Delaware, C.A. No. 8974-CD</td></tr>
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APPELLANTS' OPENING BRIEF

Team A
Counsel for Defendants Below,
Appellants

Dated: February 7, 2014

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This case comes before the Court on Defendants Below-Appellants' appeal from the Court of Chancery opinion. Plaintiffs Below-Appellees, Mercer Christian Publishing Co. and Susan Beard, brought suit against Appellants, Praise Video, Inc., et al., challenging whether Praise Video, Inc.'s ("Praise Video") directors breached their fiduciary duties to Praise Video's stockholders on December 13, 2013. (Op. at 12.) This suit followed the announcement of the merger between Praise Video and New Hope Publishing Co. ("New Hope"). *Id.* On January 14, 2014, the Delaware Court of Chancery held in favor of the Appellees and granted a preliminary injunction to prevent the consummation of the abovementioned merger. (Prelim. Inj. Order at 1.) On January 15, 2014, the Court of Chancery filed the Preliminary Injunction Order. *Id.*

On January 22, 2014, Appellants timely filed a Notice of Appeal from Interlocutory Order. (Notice of Appeal 1.) On January 23, 2014, the Supreme Court of the State of Delaware accepted the interlocutory appeal. (Order Accepting Interlocutory Appeal 1.)

SUMMARY OF THE ARGUMENT

1. The Delaware Court of Chancery analyzed Praise Video's directors' decision to approve the Merger agreement with New Hope, and related Gaming Option, under the *Blasius* standard. The *Blasius* standard applies when a board interferes with a stockholder vote in the context of a matter involving either corporate control or the election of directors. Also, before applying *Blasius*, the court must find that the board acted for the primary purpose of thwarting the stockholder vote. Praise Video's stockholders were voting on a transaction, not electing new board members, so this was not the typical context in which *Blasius* is applied. Further, the Praise Video directors approved New Hope's bid for several legitimate purposes related to the company's mission, not just to interfere with the stockholders' vote. Therefore, the court of chancery erred by applying *Blasius*.

2. Section 365(a) of the Delaware General Corporation Law requires directors of public benefit corporations to balance three distinct interests when making decisions related to the corporation's business. Directors of a public benefit corporation are deemed to satisfy their fiduciary duties to the corporation's stockholders if their decisions are informed, disinterested and reasonable. Praise Video's directors satisfied their fiduciary duties to the stockholders by acting with all available information and in a disinterested fashion when approving New Hope's bid. The directors also satisfied their balancing requirement by obtaining a share price above market value for the stockholders, and also ensuring that the corporation would be operated consistent with the Mennonite Church's mission and values.

STATEMENT OF FACTS

Appellant Praise Video is a Delaware public benefit corporation engaged in the production and distribution of filmed and digital entertainment with Christian themes. (Op. at 3-4.) Under its certificate of incorporation, Praise Video is organized as a public benefit corporation, identifying a positive effect of a religious nature, promoting the values described in the Confession of Faith in a Mennonite Perspective. (Op. at 3.)

Praise Video's board of directors (hereinafter, the "board" or the "directors") and almost all of its stockholders are members of the Mennonite Church USA (the "Church") or are related by blood or marriage to members of the Church. (Op. at 4.) Appellant Jacob Bissinger ("Bissinger") owns 22% of Praise Video's outstanding shares of common stock and has also served as the CEO of Praise Video. (Op. at 4.) In early 2013, Bissinger decided to retire as CEO of Praise Video. (Op. at 6.) After determining Bissinger would sell his shares of Praise Video, the board retained the services of financial adviser Norman Stoltzfus ("Stoltzfus") to explore possible transactions in which Praise Video stockholders could liquidate their stock. *Id.*

By June of 2013, Stoltzfus identified a number of potential bidders, including Appellee Mercer Christian Publishing Co. ("Mercer"). (Op. at 7.) Mercer suggested that an acquisition price "north of $40" was distinctly possible, which initially pleased Praise Video's directors. *Id.* Upon further investigation, however, the board learned that Mercer's anticipated market growth and increased revenues would be based in the area of combat-oriented video games, which created a rift because such an expansion violated the religious obligation of the Church, according to directors Bissinger and Howard Metcalf ("Metcalf"). *Id.* Director Samuel Holbrook ("Holbrook") took issue with this reasoning and suggested that it would be inappropriate for the directors to influence how Praise Video would operate after the sale of the company and that the directors were obligated to achieve the highest sale price. (Op. at 8.) The directors did not want to be limited to financial considerations, so they explored other options to try to achieve the best price for the stockholders, while also adhering to Praise Video's mission of promoting Mennonite values. *See* (Op. at 8-9.)

Thereafter, Praise Video's board voted to reorganize as a public benefit corporation under Delaware law, giving the directors more legal flexibility to take into consideration Mennonite values as well as maximization of financial wealth (the "Reorganization Merger"). *Id.* Over 90% of the stockholders approved the Reorganization Merger and it became effective on September 30, 2013. (Op. at 5, 9.)

Plaintiff Susan Beard ("Beard"), who holds roughly 3% of Praise Video's outstanding shares, was one of the few stockholders that voted against the Reorganization Merger (Op. at 5.) Beard is not a member of the Church; she inherited her shares after the death of her parents. *Id.* Mercer was not a stockholder at the time of the Reorganization Merger; rather, Mercer acquired 2% of Praise Video's outstanding shares for $35 per share shortly after the Reorganization Merger from a stockholder who also voted against the Reorganization Merger. *Id.*

While Praise Video was reorganizing into a public benefit corporation, Francis Pennock ("Pennock"), a Praise Video director, indicated that he could make a bid for Praise Video that would rival Mercer's suggested price, while continuing to operate the company in accordance with Church values. (Op. at 8-9.) Pennock then formed New Hope with the intention of acquiring Praise Video. (Op. at 9.)

At that point, Stoltzfus directed all identified potential bidders to submit their best bids. *Id.* After bids were submitted, New Hope's bid of $41 per share fell short of Mercer's bid of $50 per share. *Id.* New Hope also conditioned its bid on Praise Video's grant of the "Gaming Option," which allowed New Hope to acquire Praise Video's gaming division for $18 million, payable in 5-year installment notes, if the New Hope bid did not receive stockholder approval. (Op. at 10-11.)

At the December 9, 2013 board meeting, the Praise Video directors, armed with all available information, voted 4-1, with Holbrook dissenting and Pennock absenting himself, to approve the New Hope bid (the "Merger"), as they felt it was an appropriate balance of the stockholders' financial interests with the public benefit identified in Praise Video's certificate of incorporation. *Id.*

Following the announcement of the Merger, Appellees brought this action on December 13, 2013, claiming a breach of fiduciary duty by Praise Video directors and sought a preliminary injunction against consummation of the Merger. (Op. at 12.)

ARGUMENT

I. *BLASIUS* DOES NOT APPLY BECAUSE THE BOARD'S ACTION DID NOT INVOLVE ISSUES TOUCHING UPON CORPORATE CONTROL OR DIRECTOR ELECTIONS, NOR WAS THE BOARD ATTEMPTING TO "THWART THE SHAREHOLDER VOTE" BY GRANTING THE GAMING OPTION.

A. Question Presented

Must *Blasius* be applied to evaluate whether a board's grant of an asset lock-up option interferes with the stockholders' right to vote, when the board was not trying to interfere with the right and the matter to be voted on involved a business transaction, not corporate control or the election of directors?

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, 394 (Del. 1996). However, this Court exercises *de novo* review of legal issues, and "reviews the grant of a preliminary injunction without deference to the embedded legal conclusions of the trial court." *Id*.

C. Merits of the Argument

i. The *Blasius* standard is applied rarely and has limited usefulness in analyzing the board's actions because the stockholder vote did not involve matters related to corporate control or director elections.

Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651 (Del. Ch. 1988) (hereinafter, "*Blasius*"), is a case of very limited usefulness when analyzing directors' actions. In fact, the language of the two-prong test articulated in *Blasius*, considered by itself, exemplifies the test's limited utility. The two-prong test states that when a board acts "for the sole or primary purpose of thwarting a shareholder vote," then the board of directors must sustain the "heavy burden of demonstrating a *compelling justification* for such action." *Blasius*, 564 A.2d at 661 (emphasis added).

In the years since the Delaware Court of Chancery handed down the *Blasius* decision, courts have consistently struggled when deciding how broadly to apply the onerous "compelling justification" test articulated in *Blasius*. *See Chesapeake Corp. v. Shore*, 771 A.2d 293, 319 (Del. Ch. 2000). For the most part, that struggle has resulted in courts deciding not to invoke the *Blasius* test. *See, e.g., In re MONY Gp. Inc. S'holder Litig.*, 853 A.2d 661 (Del. Ch. 2004). One of the primary reasons that courts are reluctant to apply the *Blasius* test is because the test creates harsh results.

In fact, the court noted in *Mercier v. Inter-Tel (Delaware), Inc.*, that "the trigger for the test's application—director action that has the primary purpose of disenfranchisement—is so pejorative that it is more a label for a result than a useful guide to determining what standard of review should be used by a judge to reach an appropriate result." 929 A.2d 786, 806 (Del. Ch. 2007). In addition, the *Mercier* court also described the standard of review articulated in *Blasius* as "too crude a tool for regular employment." *Id*. In fact, the *Blasius* test is so strict that it has even been analogized to the tests "used to determine whether racial classifications are constitutional," meaning that determining "whether [the test] applies comes close to being outcome-determinative in and of itself." *Chesapeake*, 771 A.2d at 319-20.

Even the Delaware Supreme Court has expressed hesitance toward applying the exacting *Blasius* test, stating that the *Blasius* "burden of demonstrating a 'compelling justification' is quite onerous, and is therefore *applied rarely*." *Williams v. Geier*, 671 A.2d 1368, 1376 (Del. 1996)(emphasis added). This statement, coupled with the harsh words of the court of chancery in *Mercier* and *Chesapeake*, shows that courts have been, and should continue to be, highly reluctant to trigger a test that produces such a harsh and certain result.

In addition, while courts have discussed and pondered applying *Blasius* on numerous occasions, only a handful of courts have actually followed through and applied the *Blasius* test. *See*, *e.g.*, *MM Cos., Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118 (Del. 2003); *Mercier*, 929 A.2d 786; *Chesapeake*, 771 A.2d 293; *State of Wis. Inv. Bd. v. Peerless Sys. Corp.*, 2000 WL 1805376 (Del. Ch.); *Carmody v. Toll Brothers, Inc.*, 723 A.2d 1180 (Del. Ch. 1998). Courts' reluctance to apply such an onerous test is illustrated by the small amount of cases triggering *Blasius* review in the twenty-five years since it was decided.

Nonetheless, Appellants recognize that the sole fact that the test is onerous is not reason enough to choose not to apply it if the circumstances warrant the test's application.

However, *Blasius* is rarely applied to situations involving stockholders' rights to vote on a transaction. Despite the fact that *Blasius*, in dictum, "seemed to suggest that its reasoning applied to all stockholder votes, not just those involving the election of directors," *Mercier*, 929 A.2d at 808, the test, in reality, has rarely been applied "when the matter to be voted on does not touch on issues of directorial control." *In re MONY*, 853 A.2d 674. The court in *Mercier* stated, "the reasoning of *Blasius* is far less powerful when the matter up for consideration has little or no bearing on whether the directors will continue in office." *Mercier*, 929 A.2d at 808.

One reason "*Blasius* is not easily or readily applied outside the context of matters touching on directorial control," is that "its demanding standard could unduly limit the legitimate exercise of directorial power and discretion in other contexts." *In re MONY*, 853 A.2d at 674, n.51. Therefore, "courts will apply the exacting *Blasius* standard sparingly," particularly when matters involve a vote on a transaction. *Id*. at 674.

One of the only cases to engage in the rare practice of applying *Blasius* to a matter involving a vote on a transaction, or business decision, was *Peerless*. *See Peerless*, 2000 WL 1805376. *Peerless* involved a stockholder vote on a board proposal to increase the number of shares available for issuance through the company's option plan. *Peerless*, 2000 WL 1805376, at *3-4. The plaintiffs alleged that the defendants impermissibly interfered with the shareholder franchise because the CEO postponed the annual meeting when it appeared that the board's proposal was likely to be defeated. *Id*. This postponement caused the board's proposal to pass by a slim margin at the delayed meeting. *Id*. The plaintiffs challenged that the board's action was impermissible under *Blasius*. *Id*. The court then found *Blasius* applicable and awarded summary judgment to the plaintiffs because the board could not show a more compelling justification for its action than to thwart the shareholder vote. *Id*.

However, *Peerless* is more of the exception than the rule. *Mercier*, which was decided seven years after *Peerless*, tends to support the proposition that *Peerless* is the exception, not the rule. *Mercier* involved a set of facts that was similar to *Peerless*. In *Mercier*, a special committee of the board entered into a merger agreement, and, similar to *Peerless*, once it became clear that the company was not going to solicit enough affirmative proxies to approve the merger, the special committee decided to postpone the meeting to a later date and set a new record date. *Mercier*, 929 A.2d at 795. Moreover, like in *Peerless*, the board's action was challenged on the ground that the board acted for the primary purpose of thwarting a stockholder vote on the merger. *Id.* at 804-05.

Unlike the court in *Peerless*, however, the court in *Mercier* was hesitant to apply *Blasius* and, in fact, chose to apply *Unocal* first, while also applying *Blasius* as an alternative. *Id.* at 808-10. While deciding whether to invoke *Blasius*, Chancellor Strine went so far as to state that he did not "believe that [the *Blasius*] test should be used as to director conduct *not affecting either an election of directors or a vote touching on matters of corporate control*." *Id.* at 811 (emphasis added). Chancellor Strine reasoned the *Blasius* test is such "a potent one that [it] should not be used in garden variety situations, when more traditional tools are available to police self-dealing or improperly motivated director action." *Id.* at 811.

With this skepticism regarding *Blasius'* applicability outside the electoral context, this Court should be more persuaded to conclude that the court of chancery erred as a matter of law by invoking

Blasius. In this case, the matter to be voted on had no relation to an issue of directorial control. Rather, the vote involved the approval of a transaction, specifically, the Merger. Further, in satisfaction of the principle stated in *Mercier*, the vote here had no bearing on whether the directors would continue in office.

Thus, because of *Blasius'* limited applicability to matters outside the electoral context, along with the fact that the directors had nothing special to gain from the vote, it was improper for the court to apply the exacting *Blasius* standard to evaluate the board's act in this case. In fact, because the Gaming Option was not adopted as a measure to maintain directorial control, the *Blasius* standard should be inapplicable here. *Matter of Bear Stearns Litig.*, 870 N.Y.S.2d 709, 733 (N.Y. Sup. Ct. 2008) (applying Delaware case law).

ii. The board did not grant the Gaming Option to New Hope for the "sole or primary purpose of thwarting a shareholder vote."

While the reasons discussed above typically justify not applying *Blasius*, there is also another reason to refuse to apply its onerous test: the Appellees here have failed to meet the first prong of the *Blasius* test by failing to show that the board's "primary purpose" for granting the Gaming Option was to thwart a shareholder vote.

Courts tend to place special emphasis on scrutinizing board conduct that impedes or curtails the shareholder franchise because it is "the ideological underpinning upon which the legitimacy of directorial power rests." *Blasius*, 564 A.2d at 659.

For example, the board action at issue in *Blasius* involved the addition of two new members to defendant's seven-member board, which is purely a directorial control issue. *Blasius*, 564 A.2d at 652. In *Blasius*, the board acted to prevent a hostile bidder (the plaintiff, one of its minority stockholders) from obtaining a majority of the board through stockholder consent. *Id*. The court reasoned that the defendants prevented the stockholders from adopting the hostile bidder's proposed course, and any purpose given, other than to thwart the stockholder vote, would have been "incredible." *Id*. at 656.

However, while this shows that courts readily find that the board acts with the primary purpose of thwarting a stockholder vote when the action interferes with the electoral process, the same cannot be said about matters involving board actions affecting votes on transactions.

The matter at issue here involved the stockholder vote on a business decision (the approval of the Merger), and business decisions, as opposed to decisions simply relating to the election of directors, usually have some legitimate purpose other than solely "impeding the shareholder franchise." David C. McBride and Danielle B. Gibbs, *Interference with Voting Rights: The Metaphysics of Blasius Industries v. Atlas Corp.*, 26 Del. J. Corp. L. 927, 939 (2001). Most business decisions typically have multiple purposes, which may even be equally significant in the minds of the directors, making it very difficult to discern the "primary purpose." *Id*. It would be unthinkable to say that a board implemented a certain deal protection device in a merger transaction—undoubtedly one of the biggest business decisions a board is faced with—specifically to interfere with stockholders' right to vote. Disenfranchising stockholders may be an ancillary consideration present when deciding how to structure a merger, but that alone does not trigger *Blasius* review. The only way to trigger *Blasius* review is by acting for the "primary purpose" of thwarting a stockholder vote. *Blasius*, 564 A.2d at 661. Anything short of that will not suffice.

Courts have consistently recognized that "directors are not supposed to be neutral with regard to matters they propose for stockholder action." *Mercier*, 929 A.2d at 808-09. Likewise, "once a board of directors deems a merger agreement favorable, it may employ various legal powers to achieve a favorable outcome on a shareholder vote required to approve that agreement." *In re MONY*, 853 A.2d at 675-76. Therefore, directors need not act in a perfectly neutral fashion when proposing the approval of a merger to the stockholders.

Here, because Praise Video's "primary purpose" was not to affect the stockholder vote—even if it had the incidental effect of interfering with such vote—it was improper for the court of chancery to apply the *Blasius* test here. The board had several other reasons for granting the Gaming Option other than primarily thwarting the stockholder vote. First, the board enacted the Gaming Option to make it more likely that the New Hope deal—the one it considered the best—occurred rather than the Mercer deal, which the board feared imposed more risk on the long-term prospects of the company. (Op. at 10.) Accordingly, the board used the Gaming Option as a protective device to make it more likely that New Hope acquired the company and continued its dedication to the Church. *See* (Op. at 10.)

Second, the Gaming Option worked to draw bidders into the battle. *See Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 183 (Del. 1986). When an asset option draws bidders in, it works to "benefit shareholders." *See id.* New Hope had not submitted a bid prior to the grant of the Gaming Option, and it was uncertain if it would unless it got an extra assurance. (Op. at 9-10.) In fact, three of the five bidders failed to submit bids, and New Hope may have done the same if not for the Gaming Option. (Op. at 9.) Therefore, the Gaming Option incentivized New Hope to enter into the deal because it was primarily used to draw other bidders into the battle. *See id.*

Moreover, in this case, the onerous test limited the court's power to review whether the board legitimately excerised its directorial power and discretion. *See In re MONY*, 853 A.2d at 674, n.51. When the court of chancery decided that *Blasius* applied—in an extremely brief analysis with few justifications—it essentially labeled a result instead of truly investigating the merits of the case. Instead, the court of chancery should have evaluated and approved the board's conduct under the standard of review stated in title 8, Section 365(b) of the Delaware General Corporation Law.[1]

[1] In the alternative, even if this Court agrees with the court of chancery and believes the board acted for the primary purpose of thwarting a shareholder vote, the Appellants would still prevail under *Blasius* because the directors had a "compelling justification" for granting the Gaming Option to New Hope. *Mercier* established that a "compelling justification" exists when directors act "for the purpose of preserving what they believed in good faith to be a value-maximizing offer for the shareholders." *Mercier*, 929 A.2d at 819. Moreover, because of the special nature of directors' fiduciary duties in a public benefit corporation, the term "value-maximizing" must be analyzed in light of these unique fiduciary duties. Thus, as is discussed in Part II of the brief, Praise Video's directors have satisfied their fiduciary duties to the company and the stockholders by properly engaging in Section 365(b)'s balancing test. Accordingly, the directors created a "value-maximizing" offer for the stockholders.

II. THIS COURT SHOULD VACATE THE PRELIMINARY INJUNCTION ORDER BECAUSE THE DIRECTORS' DECISIONS TO GRANT THE GAMING OPTION AND APPROVE THE MERGER WITH NEW HOPE SATISFIED THEIR FIDUCIARY DUTIES TO PRAISE VIDEO'S STOCKHOLDERS, AS THOSE DUTIES ARE DEFINED IN TITLE 8, SECTION 365 OF THE DELAWARE GENERAL CORPORATION LAW.

A. Question Presented

Under Delaware law, can a public benefit corporation's merger agreement be invalidated even when the directors satisfied their fiduciary duties by making an informed, disinterested and reasonable decision, while also properly balancing stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit identified in its certificate of incorporation?

B. Scope of Review

A grant of a preliminary injunction is reviewed for abuse of discretion. *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 394 (Del. 1996). Importantly, "this Court reviews the grant of a preliminary injunction without deference to the embedded legal conclusions of the trial court." *Id.* at 394 (citing *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361 (Del. 1995)).

C. Merits of the Argument

i. This Court should not disturb the board's decision to approve the Merger, nor invalidate its grant of the Gaming Option, because Section 365 affords the directors protections that are similar to those afforded by the business judgment rule.

Typically, "when shareholders challenge directors' actions, usually one of three [standards of] review is applied: the traditional business judgment rule, the [*Unocal/Revlon* standards] of enhanced judicial scrutiny, or the entire fairness analysis." *Unitrin*, 651

A.2d at 1371. The proper standard of review depends upon the nature of the case. *See id.*

In this case, if Praise Video were not a public benefit corporation, the proper standard of review would likely be the *Revlon* standard. *Revlon* is triggered when a company is "for sale," or, in other words, when "a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear break-up of the company." *Paramount Commc'ns, Inc. v. Time, Inc.*, 571 A.2d 1140, 1150 (Del. 1990). In such circumstance, the directors' only duty is to maximize stockholders' benefit by getting the best price reasonably available for the company. *See Revlon*, 506 A.2d at 182.

Here, there is no dispute that Praise Video initiated an active auction because, in mid-November 2013, Stoltzfus directed all five potential bidders, including New Hope and Mercer, to submit their best bids by December 5, 2013. (Op. at 9.) Accordingly, it is likely that the board would be required to satisfy *Revlon's* requirement of maximizing stockholders' benefit by obtaining the highest price reasonably available.

However, because Praise Video is a public benefit corporation, it is subject to different rules than an ordinary corporation. The statutory language governing public benefit corporations persuasively justifies this proposition.[2]

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[2] The language of the statute is also helpful in giving some insight as to the legislative intent, which may reasonably be interpreted as (1) combating the short-term focus that is so prevalent in Delaware's takeover jurisprudence, and (2) promoting public benefit corporation's

Per Section 362(a), a public benefit corporation "shall be managed in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the . . . public benefits identified in its certificate of incorporation." Del. Code Ann. tit. 8, § 362(a) (West 2013). An important thing to note about this tri-partite balancing test is the fact that it is mandatory, not optional. *See id.* Also, under Section 365(b), a director is deemed to have fulfilled his or her fiduciary duties to the stockholders and the corporation if the director's decision is (1) informed, (2) disinterested, and (3) not such that "no person of ordinary, sound judgment would approve." *Id.* § 365(b). This language shows that, in public benefit corporations, "[d]irectors . . . receive significant protections against claims by stockholders challenging disinterested decisions." Del. S.B. 47 syn., 147th Gen. Assem. (2013), *available at* http://www.legis.delaware.gov/LIS/lis147.nsf/vwLegislation/SB+47/$file/legis.html?open.

Further, in enacting the public benefit statutes, particularly Section 365(b), the Delaware Legislature essentially imposed a presumption similar to the business judgment rule presumption for any decision implicating Section 365(a)'s balancing requirement. The statement in Section 365(b) that a director's fiduciary duties are deemed satisfied if "such director's decision is informed and

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directors' fiduciary discretion for purposes of protecting such corporations whose goal, or mission, is vital to their existence. These intentions make it clear that directors can turn down more cash in order to protect the public benefit corporation's mission.

disinterested" is essentially a reformulation of the protection afforded by the business judgment rule. Del. Code Ann. tit. 8, §§ 365(a), 365(b).

To avail themselves of the protections of the business judgment rule, directors in ordinary corporations need to satisfy two requirements. First, the business judgment rule's protections can only be claimed by "disinterested directors whose conduct otherwise meets the tests of business judgment." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). This requirement means directors must satisfy their duty of loyalty to stockholders before being afforded the protection of the business judgment rule. Second, "to invoke the [business judgment] rule's protection directors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them." *Id.* This requirement assures that a director satisfies his or her duty of care before being afforded the business judgment rule protections.

After comparing Section 365(b)'s language to the business judgment rule's language, it is clear that the requirements for directors to satisfy their fiduciary duties are essentially the same under both standards. In other words, Section 365(b)'s standard for analyzing directors' decisions has the same effect as the standard for invoking the business judgment rule. In Section 365(b), if a director's decision is informed and disinterested, then its fiduciary duties are deemed satisfied. Similarly, with the business judgment rule, if the directors are disinterested and inform themselves of all material information reasonably available to them, the directors' decisions are subject to the protection of the business judgment rule and their fiduciary duties are deemed satisfied unless the plaintiff rebuts the business judgment rule's presumption.

This similarity makes sense in light of the unique nature of the balancing requirement imposed on directors of public benefit corporations. If the decisions of public benefit corporations' directors were subject to any other type of standard, such as *Revlon*, the public benefit statutes would essentially have no purpose. If *Revlon* applied, directors could not consider any factors other than the maximization of stockholder wealth when selling the company, which would run counter to the public benefit corporation statutes' main purpose. Hence, this Court must use Section 365(b)'s standard because it gives directors the discretion to make decisions in accordance with the balancing requirement.

Lastly, for the Appellants' fiduciary duties to be deemed satisfied, their decisions must implicate Section 365(a)'s balancing requirement. tit. 8, §365(b). Any decision involving the management or direction of the business and affairs of the public benefit corporation implicates Section 365(a)'s balancing requirement. *Id.* § 365(a). Accordingly, Praise Video's directors' decision implicated the balancing requirement because a merger is a quintessential business decision. Because of this, and because the directors' decision was informed, disinterested and reasonable, this court should rule that the directors satisfied their fiduciary duties to the stockholders and vacate the court of chancery's preliminary injunction order.[3]

a. The directors satisfied their duty of care to Praise Video's stockholders because their decisions were informed.

First, for directors to satisfy their fiduciary duties under Section 365(b), they must make an informed decision. This inquiry triggers the duty of care, which requires directors to properly "inform themselves, prior to making a business decision, of all material information reasonably available to them." *Aronson*, 473 A.2d at 812. Further, after becoming so informed, directors must "act with requisite care in the discharge of their duties." *Id.*

In this case, the Appellants did not breach their duty of care. First, the Appellees themselves acknowledged, "there was nothing lacking in the directors' informational base." (Op. at 10.) Second, the directors hired financial adviser Norman Stoltzfus to explore possible merger options. (Op. at 6.) Moreover, the Appellants consulted their legal counsel to ensure that they followed applicable laws. (Op. at 8, 10-11.) These actions show that they were committed to making the best, most informed decision possible. Lastly, the board meeting to approve the New Hope bid lasted over seven hours,

[3] Separate analysis of the gaming option itself (under such cases as *Revlon* and *Mills Acquisition Co. v. Macmillan*, *Inc.* 559 A.2d 1261 (Del. 1989)) is unwarranted here. The court of chancery's memorandum opinion only addressed the board's actions in *approving* the Gaming Option, not the option itself. Thus, only the issue of whether the board's decision to approve the Merger with New Hope, and the related Gaming Option agreement, satisfied its fiduciary duties under Section 365(b) will be analyzed. However, even if analyzed under these standards, the Gaming Option itself was still appropriate because it conferred a substantial benefit upon the shareholders, was informed, and its grant was not induced by a breach of fiduciary duties.

showing that the directors thought long and hard about this decision and it was not a thoughtless one. (Op. at 10.) For these reasons, the directors made an informed decision and satisfied their duty of care to the Praise Video stockholders.

b. The directors satisfied their duty of loyalty to Praise Video's stockholders because their decisions were disinterested.

Next, the directors need to make a disinterested decision to satisfy their fiduciary duties under Section 365(b). The concept of directors' interest means that "directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from [the decision] in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally." *Aronson*, 473 A.2d at 812.

Here again, it is clear that Praise Video's directors made a disinterested decision. Appellants proactively sought to guarantee that the decision-makers were disinterested. For example, because Pennock had a financial interest in the outcome, he abstained from voting. (Op. at 9.) Further, the record does not mention that any other director stood to gain financially from the Merger in any special way other than the price they were to receive as Praise Video stockholders. New Hope did not offer any of Praise Video's directors a position on its board, and the record does not show that scenario was even a possibility in the future. Therefore, for these reasons, the directors made a disinterested decision and they satisfied their duty of loyalty to Praise Video's stockholders under Section 365.

c. The board's decisions were not such that "no person of ordinary, sound judgment would approve."

Lastly, for the directors to satisfy their fiduciary duties under Section 365(b), the directors must not make a decision such that "no person of ordinary, sound judgment would approve." tit. 8, § 365(b). Because the public benefit statutes have existed for less than a year, there is little guidance on what type of decision is one that "no person of ordinary, sound judgment would approve." However, this requirement seems to address reasonableness. Section 365(a)'s balancing requirement guides the analysis of whether the board's decision was reasonable. If the board appropriately engaged in the tri-partite balancing test, then their decision is reasonable.

Here, the board's decision was reasonable. In making its decision, the board properly balanced the stockholders' pecuniary interests, the best interests of those affected by Praise Video's conduct, and the public benefit identified by the company.

First, the directors took into consideration the stockholders' pecuniary interests by accepting a price above the stock's market value. Mercer acquired its stock shortly after the Reorganization Merger for $35 per share. (Op. at 5.) Two months later, Praise Video's board accepted $41 per share from New Hope for it to acquire Praise Video. (Op. at 9.) Also, there was no established market for Praise Video's stock. (Op. at 5.) Therefore, the market value likely remained about the same in the two months between Mercer's purchase of the stock and the approval of the Merger. So, in light of that, Praise Video's stockholders still received a $6 premium above market value by approving New Hope’s bid. While this is not as big of a premium as the stockholders would have received from the Mercer bid, it is still a premium. And, because the board was required to take into account multiple considerations, not just price, this $6 premium is more than sufficient because the public benefit statutes make clear that directors can turn down more cash in order to protect the corporation’s mission. If it were any other way, the public benefit corporation statutes would serve no purpose.

Moreover, Praise Video’s directors took the stockholders’ pecuniary interests into account by accepting a price around what Mercer initially suggested, which was “north of $40.” (Op. at 7.) In fact, the record shows that at the June 24 board meeting the directors were pleased with the price suggested by Mercer. (Op. at 7.) The stockholders also probably would have been pleased with this price because it was a decent amount greater than the last known market value of the stock. Therefore, the board properly considered the stockholders’ pecuniary interests because it accepted a price markedly greater than the market value.

Second, the directors sufficiently considered the interests of those affected by Praise Video’s conduct, and the company’s public benefit, by choosing the bidder that was most likely to continue Praise Video’s commitment to promoting Church values. (Op. at 4, 10.) New Hope’s bid did not present the same risk to the values of the Church, and Praise Video, as Mercer’s bid. Mercer was owned by a large, multinational media conglomerate, and Mercer’s plans for market growth might have included combat-oriented games. (Op. at 5, 7.)

This plan was totally against the Church's, and Praise Video's, beliefs and values. (Op. at 7-8.) On the other hand, Pennock promised Praise Video that, after the acquisition, he would operate the business in a manner consistent with the values of the Church. (Op. at 10.) Hence, it was more likely that New Hope would carry on Praise Video's mission in a manner consistent with the Church's values than Mercer would, and the board properly considered this factor.

Lastly, in the court of chancery, Appellees argued, and might argue again, that the "considerations of religious purpose effectively trumped any balancing effort." (Op. at 15.) However, the Appellants' discussions at board meetings, as well as the premium received by the stockholders, illustrate that the varying interests were considered, not just one or the other. (Op. at 7-9, 11) Further, the public benefit corporation statutes do not specify that the identified public benefit must be subordinated to a corporation's financial considerations. *See* tit. 8, § 365. Therefore, the Merger agreement is not one that no person of ordinary, sound judgment would approve.

Therefore, because the directors' decision was informed, disinterested, and not one such that "no person of ordinary, sound judgment would approve," the Appellants have fulfilled their fiduciary duties. Accordingly, the preliminary injunction order should be vacated and the Merger should be allowed to proceed as planned, and the stockholders should be given the opportunity to vote to decide for themselves whether to accept less money in exchange for greater promotion of the company's identified public benefit.

CONCLUSION

For the foregoing reasons, this Court should vacate the court of chancery's preliminary injunction order, which preliminary enjoined Appellants from consummating the Merger, and allow the Merger to proceed to a stockholder vote.

Respectfully Submitted,

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Team A,
Counsel for Defendants Below,
Appellants.

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