IN THE SUPREME COURT OF THE STATE OF DELAWARE

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.,	:	No. 43, 2014.
Appellants,	:	
v.	:	Court Below Court of Chancery of the State of Delaware
MERCER CHRISTIAN PUBLISHING CO. and SUSAN BEARD	:	C.A. No. 8974-CD
Appellees.	:	

APPELLEES' ANSWERING BRIEF

Team D
Attorneys for Appellees

February 7, 2014

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Delaware Supreme Court

Delaware Court of Chancery

Statutes

Secondary Materials

NATURE OF PROCEEDINGS

This is an appeal from the Court of Chancery's Memorandum Opinion ("Memo. Op."), dated January 14, 2014. On December 13, 2013, Plaintiffs below-Appellees, Mercer Christian Publishing Co. ("Mercer"), and Susan Beard ("Beard"), commenced this action against Defendants below-Appellants, Praise Video Inc. ("Praise Video"), Jacob Bissinger, Francis Pennock, Mark van Zandt, Howard Metcalf, Peter Hornberger (collectively "Defendant Directors"), New Hope Publishing Co. ("New Hope"), and Praise New Hope, Corp.

Mercer and Beard moved for a preliminary injunction against consummation of a Merger Agreement between Praise Video, New Hope and Praise New Hope, Corp. alleging the Defendant Directors of Praise Video did not engage in a balancing of interests as required by Del. Code Ann. tit. 8 § 365(a) and interfered with the stockholders' statutory voting rights.

On January 15, 2014, Chancellor Sean Develin granted Appellees' Motion for Preliminary Injunction enjoining Appellants from taking any action to effectuate, enforce or consummate any term or provision of the Merger Agreement.

On January 22, 2014, Appellants filed a Notice of Appeal from Interlocutory Order, which was accepted by this Court on January 23, 2014.

SUMMARY OF ARGUMENT

I. The Court of Chancery correctly granted the Motion for Preliminary Injunction because Appellees have a reasonable probability of success on the merits to show the primary purpose of Defendant Directors' acceptance of the New Hope Gaming Option was to thwart stockholder voting rights. The Gaming Option's coercive effect on the stockholders prevented Mercer from gaining support and it lost any opportunity to bid competitively. Defendant Directors breached their obligations to reasonably seek the transaction offering the best value by unilaterally accepting the Gaming Option because it foreclosed any possible merger with any company other than New Hope. Mercer's offer did not reasonably present a threat to Praise Video that warranted such a defensive response. Nonetheless, Defendant Directors perceived it as such and responded disproportionately to the possible use of the company's gaming division in a way contrary to Church values. Defendant Directors reorganized the company to maximize their control regardless of the financial consequences of such a decision and thus breached their fiduciary duties.

II. Defendant Directors had an affirmative duty to balance the pecuniary interests of the stockholders under § 365(a). The statutory language creating the affirmative duty to conduct a tripartite balancing is clear; however, the statute is silent with regard to its practical application. Relying on the impetus for public benefit legislation and the intent and purpose of the statutes, it is apparent that the tripartite balancing test is not meant to give directors cart blanche to ignore the for-profit nature of public benefit

corporations. In this case, Defendant Directors failed to meet their statutory duties by refusing to balance the pecuniary interests of Praise Video stockholders as required. Instead, they treated the newly created public benefit mission as dispositive of any merger decision. Defendant Directors acted without regard to the maximization of shareholder wealth and gave New Hope a "crown jewel" in the form of Praise Video's most valuable business segment far below fair value and to top it off, at a share price below that of the other bid. Even after these concessions, it was certain the public benefit mission would not continue post-merger because no bidder agreed to its inclusion. No person would agree to such a poor financial deal based on so few certainties.

STATEMENT OF FACTS

A. Background Facts

Praise Video was formed on September 30, 2013 in Delaware after a merger between the former Praise Video into the new public benefit corporation. (Memo. Op. p. 3-4). As a public benefit corporation, Praise Video's certificate of incorporation describes its specific public benefit as "the promotion of the values articulated in the Confession of Faith in a Mennonite Perspective." (Memo. Op. p. 3). Praise Video engages in the production and distribution of entertainment media which does not contain violence or "sexually offensive entertainment." (Memo. Op. p. 4).

Plaintiffs, Beard and Mercer, own an aggregate of 5% of Praise Video's outstanding stock.[1] (Memo. Op. p. 5). Mercer is known for its publication of Bibles, inspirational books, resources for church school curricula, and Christian faith-based audio and digital content. (Memo. Op. p. 5). Mercer's stated mission is to "spread inspiration by developing and distributing content that promotes biblical values and honors Jesus Christ." (Memo. Op. p. 5).

B. Bissinger's Retirement and Board Reaction

The CEO of Praise Video is Jacob Bissinger ("Bissinger"), who has served in this position since the inception of the company in the 1970s. (Memo. Op. p. 4). Bissinger owns approximately 22% of the outstanding common stock of Praise Video. (Memo. Op. p. 4). All other

[1] Pursuant to Sup.Ct.Rule 14(b)(v), Appellees are referred to as Plaintiffs within the Statement of Facts. Similarly, Appellants are referred to as Defendants.

Praise Video directors own approximately 4% of the common stock and are members of the Mennonite Church USA (the "Church") or are related by blood or marriage to members of the Church. (Memo. Op. p. 4). In early 2013, Bissinger planned to retire from the position of CEO within one year and he wished to diversify his investments, so "he concluded that selling his Praise Video shares would be an important step." (Memo. Op. p. 6). Once the board of directors learned of Bissinger's decision, Norman Stoltzfus ("Stoltzfus") was retained to explore possible alternatives such as transactions allowing for stockholders' liquidation of Praise Video stock. (Memo. Op. p. 6). By early June 2013, Stoltzfus identified potential bidders to acquire Praise Video stock for cash, one of which was Mercer. (Memo. Op. p. 6).

On June 24, 2013, the board held a meeting where Stoltzfus reported Mercer was interested in purchasing Praise Video for "north of $40." (Memo. Op. p. 7). This information pleased the board because of the possible sale price and because Mercer was a Christian oriented business. (Memo. Op. p. 7). During this meeting, Bissinger inquired as to the possible synergies between the two companies. (Memo. Op. p. 7). Stolzfus indicated that there was the possibility of market growth of the video-game business into the area of combat-oriented games by Mercer. (Memo. Op. p. 7). Upon learning this information, Bissinger and Howard Metcalf ("Metcalf") stated an expansion into military-type games violated the religious obligation of Praise Video and was against their religious precepts. (Memo. Op. p. 8). After this meeting the directors asked Stoltzfus to identify any other bidders,

specifically bidders who might be able to address their concerns about the "direction of future operation of the company's business." (Memo. Op. p. 8).

C. Reorganization Merger

Sometime before the September 2013 vote, the Praise Video board presented the "Reorganization Merger" to the stockholders. (Memo. Op. p. 8). The board informed the stockholders it was engaged in a process of exploring strategic alternatives, including a possible sale of the company. (Memo. Op. p. 8-9). The Reorganization Merger was in "response to Bissinger's plan to retire" and the "accomplishment of the Reorganization Merger would likely afford the directors greater legal flexibility in a sale of the company to take into consideration Mennonite values as well as *maximization of financial wealth*. (Memo. Op. 9)(emphasis added).

The board called a vote in September of 2013 regarding the Reorganization Merger (Memo. Op. p. 8). The Reorganization Merger was approved by over 90% of Praise Video's stockholders. (Memo. Op. p. 5).

Around the same time as the Reorganization Merger, Director Francis Pennock ("Pennock") formed New Hope with Miller Price L.P. ("Miller Price"), with Pennock holding 20% of the newly formed company and Miller Price holding 80%. (Memo. Op. p. 6). New Hope is organized under Delaware law and was formed for the purpose of acquiring Praise Video. (Memo. Op. p. 6). New Hope then created a wholly-owned subsidiary to merge with Praise Video, Praise New Hope, Inc. (Memo. Op. p. 6). Pennock indicated to Stoltzfus an interest in submitting a

bid to acquire Praise Video that would be consistent with the price previously indicated by Mercer. (Memo. Op. p. 9).

D. Bidding Process

In mid-November 2013, with the approval of the Praise Video board (Pennock abstaining and absenting), Stoltzfus, directed Mercer, New Hope, and three other potential bidders to submit best bids accompanied by merger forms and related documentation by the close of business on December 5, 2013. (Memo. Op. p. 9). Praise Video requested that each of the bids include an agreement that the post-merger certificate of incorporation include the public benefit provision in Praise Video's existing charter. (Memo. Op. p. 9). The only two bids received by Praise Video were those of Mercer and New Hope. (Memo. Op. p. 9).

Mercer submitted a bid of $50 per share. (Memo. Op. p. 9). The bid was conditioned on approval by Praise Video's stockholders. (Memo. Op. 9). However, the Mercer bid did not agree to include the public benefit provision in the post-merger certificate of incorporation, and included typical termination fees and no-shop commitments. (Memo. Op. p. 9-10).

New Hope submitted a bid of $41 per share. (Memo. Op. p. 9). The bid did not agree to include the public benefit provision in the post-merger certificate of incorporation, and included typical termination fees and no-shop commitments. (Memo. Op. 9-10). In addition, the bid was conditioned on a "crown jewel" concession that became exercisable under any of the following circumstances:

> (A) the Merger agreement is terminated due to failure of Praise Video stockholders to approve it, and at or prior to the time of termination, a proposal to acquire Praise Video has been announced or made to Praise Video's board and not *bona fide* withdrawn; and (B) within 12 months of such termination Praise Video is acquired or enters into a definitive agreement to be acquired.

(Memo. Op. p. 10 n. 12).

The crown jewel provision (the "Gaming Option") permitted New Hope to acquire Praise Video's gaming division for $18 million, which was recognized to be 40% below the $30 million fair value of the division. (Memo. Op. p. 10). New Hope also conveyed to the Praise Video board Pennock would be CEO of Praise New Hope, Inc. following the acquisition and he would operate the company in a manner consistent with the values of the Church despite the absence of the public benefit provision. (Memo. Op. p. 10). However, Pennock was not a majority owner of New Hope. (Memo. Op. p. 6). The majority owner, Miller Price, a partnership where only one partner was a member of the Church, had no obligation to continue Praise New Hope, Inc. as a public benefit corporation. (Memo. Op. p. 10).

Praise Video's board met on December 9, 2013 to evaluate the bids received. (Memo. Op. p. 10). The board reviewed the bidding process with Stoltzfus, the impact of the Gaming Option, and the prospect for further bids and concluded that the company had been thoroughly shopped. (Memo. Op. p. 11). In this meeting, Bissinger and Metcalf again expressed deep concern about the *possible* future operation of Praise Video by Mercer and a *possible* expansion into combat games. (Memo. Op. p. 11)(emphasis added). They were also concerned Mercer was a wholly-owned subsidiary of a secular corporation, Mercer Media.

(Memo. Op. p. 11). Director Samuel Holbrook testified Bissinger also stated he would not support any merger with Mercer based on the *possibility* of an expansion into combat games, **n***o matter the difference in the bid prices*. (Memo. Op. p. 11-12)(emphasis added).

When the board discussed the Gaming Option they believed the undervaluation of the exercise price would encourage many Praise Video stockholders to vote in favor of the Merger with New Hope, *even if they would have preferred the higher Mercer cash bid*. (Memo. Op. p. 12)(emphasis added). The board's belief stemmed from the fact that the Gaming Option allows New Hope to purchase the gaming division in the case of any termination of New Hope's Merger agreement. Thus, allowing New Hope to purchase the largest revenue generating division of Praise Video substantially below fair value. (*See* Memo. Op.) The directors viewed this effect positively; it would favor the consummation of the merger with New Hope and achieve their view for future operation of the company post-merger despite New Hope's refusal to include the public benefit provision in its bid. (Memo. Op. p. 12).

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY GRANTED AN INJUNCTION UNDER BLASIUS.

A. Question Presented

Whether, under Delaware law, the Praise Video Directors breached their fiduciary duties by intentionally affecting stockholder voting rights.

B. Scope of Review

The Supreme Court reviews the Court of Chancery's grant of a preliminary injunction without deference to the legal conclusions of the trial court. *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998).

C. Merits of Argument

i. Defendant Directors acted for the sole and primary purpose of thwarting a shareholder vote requiring enhanced scrutiny under *Blasius*.

In *Blasius*, the Court of Chancery held the business judgment rule does not apply to board acts taken for the primary purpose of interfering with a stockholder vote, even if those acts are taken advisedly and in good faith. *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 660 (Del. Ch. 1988). The "onerous" burden of *Blasius* is rarely applied, and only where the primary purpose of the board's action is to interfere with or impede exercise of the stockholder franchise, and the stockholders are not given a full and fair opportunity to vote. *See Williams v. Geier*, 671 A.2d 1368, 1376 (Del. 1996). *Blasius* could be applied "either independently, in the absence

of a hostile contest for control, or within the *Unocal* standard of review when the board's action is taken as a defensive measure." *MM Cos. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1130 (Del. 2003). The standard set forth in *Blasius* is conjunctive and requires a plaintiff to show both a primary purpose and the thwarting of the franchise. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 179 (Del. 1986).

Here, the actions taken by the Praise Video board were coercive on the stockholder vote, and the board knew their actions were coercive. According to the Minutes from the December 9, 2013 meeting, Defendant Directors acknowledge the value placed on the Gaming Option reflected an exercise price that undervalued the business by a substantial margin (Defendant Directors acknowledged a valuation about 40% below the company's true value). (Memo. Op. p. 2, 12). This valuation "would likely encourage many Praise Video stockholders to vote in favor of the merger, even if they individually would have preferred" the higher cash bid offered by Mercer. (Memo. Op. p.12). The directors "viewed this likely effect positively" because it would "facilitate the consummation" of the merger with New Hope. (Memo. Op. p.12).

Given the board's acknowledgement of this fact, the coercive nature of the Gaming Option is devastatingly apparent. Praise Video's directors accepted the condition of New Hope's Gaming Option *after* becoming fully informed of its function and consequence. Once the board had become fully aware of the impact of the Gaming Option, Defendant Directors developed their favorable view of the option as

shown *supra*. Defendant Directors still decided to accept New Hope's bid, without trying to alter the Gaming Option, based almost exclusively on their reasoning that the stockholders could not vote against a merger with New Hope. Defendant Directors' knowledge, coupled with their actions, regarding the Gaming Option show they intended to thwart the stockholder vote in favor of New Hope regardless of price. *See Blasius*, 564 A.2d at 660.

ii. The preliminary injunction is necessary to prevent irreparable harm to Appellees.

To obtain a preliminary injunction, a plaintiff must demonstrate both a reasonable probability of success on the merits and some irreparable harm which will occur absent the injunction. *Gimbel v. Signal Cos.*, 316 A.2d 599, 602 (Del. 1974), *aff'd,* 316 A.2d 619 (Del. 1974). Additionally, the Court shall balance the conveniences and possible injuries to the parties. *Gimbel*, 316 A.2d at 602.

Appellants concede that if Appellees demonstrate a reasonable probability of success on the merits a preliminary injunction would be appropriate. (*See* Memo. Op. at 13). As such, the only contested issue related to the injunction is the likelihood of success on the merits. There is a high likelihood Mercer will be damaged by any stockholder vote taken by Praise Video. Due to the coercive nature of the stockholder vote, and its skew in favor of New Hope, Mercer will not have a fair opportunity at gaining any stockholder support and will be irreparably damaged.

The factual situation in *Revlon* is highly analogous to the situation between Mercer and New Hope with regard to injunctive relief in the context of mergers. *See Revlon*, 506 A.2d at 184-85. In *Revlon*,

the plaintiff shareholders brought an action against the defendant directors regarding certain irregularities of a corporate auction. *Id.* at 175-76. The plaintiffs moved for an injunction to bar Forstmann, a third party corporation, from engaging in deals with the defendants. The injunction was granted because the defendants breached their duty of care by entering into the transactions without maximizing the sale price of the company for the stockholders' benefit. *Id.* The Delaware Supreme Court stated that due to the defendants' actions when the opportunity for another company, Pantry Pride, to bid against Forstmann was lost, an injunction was appropriate. *Id.* at 185.

As in *Revlon*, Mercer lost the opportunity to bid competitively with New Hope once the Praise Video board accepted the Gaming Option and forced the stockholders' hands in any vote. *See id.* at 183. Thus, there is sufficient need for an injunction to protect Mercer from an irreparable harm, as demonstrated by the facts. *See id.* at 185.

iii. Defendant Directors' breached their fiduciary obligations to the stockholders by accepting New Hope's Gaming Option.

The ultimate responsibility for managing the business and affairs of a corporation falls on its board of directors. Del. Code Ann. tit. 8 § 141(a)(2013). In carrying out their duties, directors owe fiduciary duties of care and loyalty to the corporation and its shareholders. *Aronson v. Lewis,* 473 A.2d 805, 811 (Del. 1984); *Guth v. Loft, Inc.,* 5 A.2d 503, 510 (Del. 1939). Directors are bound by the duty of care which imposes a set of procedural requirements on the directors' decision-making process. "These principles apply with equal force when a board approves a corporate merger pursuant to Del. Code Ann. tit. 8 § 251(b); *Smith v. Van Gorkom,* 488 A.2d 858, 873 (Del.

1985); as they are regarding corporate takeover issues." *Revlon,* 506 A.2d at 179-80(citing *Pogostin v. Rice,* 480 A.2d 619, 624 (Del. 1984)(internal quotations omitted). While the business judgment rule may be applicable to the actions of corporate directors responding to takeover threats, the principles upon which it is founded—care, loyalty and independence—must first be satisfied. *Aronson,* 473 A.2d at 812.

The directors of a corporation "have the obligation of acting reasonably to seek the transaction offering the best value reasonably available to the stockholders," *Paramount Commc'ns, Inc. v. QVC Network, Inc.,* 637 A.2d 34, 43 (Del. 1994). This obligation exists in at least the following three scenarios: (1) "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); (2) "where, in response to a bidder's offer, a target abandons its long-term strategy and seeks an alternative transaction involving the break-up of the company," *id.;* or (3) when approval of a transaction results in a "sale or change of control," *QVC,* 637 A.2d at 42–43, 47.

By telling Stoltzfus to further investigate possible buyers for Praise Video after learning of Mercer's interest, the board was actively seeking to find another bidder to oppose Mercer, and the sale of Praise Video was inevitable. It was at this time the duty of the board changed "from the preservation of [Praise Video] as a corporate entity to the maximization of the company's value at a sale for the

stockholders' benefit." *See Revlon*, 506 A.2d at 182. "The directors' role change[s] from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company." *See id*. at 182.

By unilaterally accepting the Gaming Option, the board essentially foreclosed any possible merger with any company besides New Hope due to the coercive terms contained within the option. Any stockholder participating in the merger vote, who reads the preclusive terms of the option, would quickly realize there is no real choice presented by the vote; New Hope is the choice.

"Lock-ups which draw bidders into the battle benefit shareholders, similar measures which end an active auction and foreclose further bidding operate to the shareholders' detriment." *Id*. at 183. By approving the Gaming Option, the board has breached its obligation to act "reasonably to seek the transaction offering the best value" because the board has essentially approved the lower New Hope bid *ex-ante* without affording the stockholders their right to accept the higher bid.

iv. Defendant Directors' defensive response to the perceived threat of Mercer was disproportionate and violated the standards of *Unocal*[2].

In transactional justification cases, the directors' decision is reviewed judicially and the burden of going forward is placed on the directors. *See* Joseph Hinsey, IV, *Business Judgment and the American Law Institute's Corporate Governance Project: the Rule, the Doctrine*

[2] *Unocal v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

and the Reality, 52 Geo.Wash.L.Rev. 609, 611–13 (1984). A board must sustain its burden of demonstrating that, even under *Unocal's* standard of enhanced judicial scrutiny, *its actions* deserved the protection of the traditional business judgment rule. *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1375 (Del. 1995)(emphasis added).

"The first aspect of the *Unocal* burden, the reasonableness test, require[s] the [Praise Video] Board to demonstrate that, after a reasonable investigation, it determined in good faith, that [Mercer]'s Offer presented a threat to [Praise Video] that warranted a defensive response." *See Unitrin*, 651 A.2d at 1375. On June 24, 2013, the board learned of Mercer's interest from Stoltzfus. There are no facts which point to the time spent by the Praise Video board investigating whether any possible offer price from Mercer represented a threat to Praise Video. However, Bissinger and Metcalf were "outspoken" about Mercer's possible future synergistic use of the gaming division by branching into combat-oriented games. Again, there are no facts which point to the amount of time this discussion may have occupied, but the facts are clear as to the Defendant Directors' beliefs about a merger with Mercer. Therefore, facts at hand do not support any "reasonable investigation" or a "good faith" determination of the merits of Mercer's interest in Praise Video and the board cannot support their initial burden under *Unocal*. *See id.* at 1375.

"The second aspect or proportionality test of the initial *Unocal* burden require[s] the [Praise Video] Board to demonstrate the proportionality of its response to the threat" Mercer may have posed. *See id.* at 1376. The Praise Video board's response to learning Mercer

may develop combat-oriented games post-merger was to determine the quickest and easiest way to fully exert the current board's interests in any merger transaction. Legal counsel for Praise Video determined one way to possibly "alter the directors' legal obligations" would be by reorganizing as a public benefit corporation. It was at this stage, before any firm offer was submitted by Mercer, that Praise Video actively undertook its reorganization. Praise Video's board determined a reorganization of the company was a proportionate response to learning a *possible* merger candidate could *possibly* use the company's gaming division to create games that are incompatible with the current board's personal beliefs.

Unitrin is instructive of the *Unocal* standard as it applies to this case. In *Unitrin*, the Court of Chancery determined a target could determine a bidder's tender offer undervalues the company and utilize defensive measures, such as a poison pill, to prevent a lowball sale of the corporation. *Id.* at 1367.

Although the factual circumstances are distinguishable, the application of the legal principles of *Unitrin* requires a similar outcome. Praise Video had not received an offer from Mercer before the board determined the possibility of greater control in the sale of the company was necessary, and to achieve that end a complete reorganization of the company was required. In applying current Delaware corporate law doctrine, as demonstrated in *Unitrin*, the Praise Video board's response to learning of future possibilities involving a post-merger Praise Video were not proportional in any way to the "perceived threat" Mercer posed to the company. *See id.* at

1376. Reorganizing Praise Video was to further the Defendant Directors' interest in exercising the maximum amount of control over the sale of the company with no regard to the interests of the other stockholders.

II. DEFENDANT DIRECTORS FAILED TO BALANCE THE 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 AS REQUIRED UNDER Del. Code Ann. tit. 8 § 365(A).

A. Question Presented

Whether the Directors of a public benefit corporation may disregard the pecuniary interests of stockholders in favor of a public benefit provision stated in the company's charter where no bidder has agreed to continue the public benefit provision post-merger under § 365(a).

B. Scope of Review

The Supreme Court reviews the Court of Chancery's grant of a preliminary injunction without deference to the legal conclusions of the trial court. *SI Mgmt L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998).

C. Merits of Argument

i. Section 365(a) imposes an affirmative duty on Defendant Directors of a public benefit corporation to balance pecuniary and specific public benefit interests.

In addition to *Revlon* duties mandated in a change of control transaction, § 365(a) imposes an affirmative duty on directors of public benefit corporations to balance other interests inapplicable to for-profit general corporations formed under Delaware General Corporate Law. Section 365 states, in part,

> the board of directors shall manage or direct the business and affairs of the public benefit corporation in a manner that *balances* the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or purpose benefits identified in its certificate of incorporation.

(emphasis added).

The tripartite balancing requirement expressly outlined in the statutory framework requires directors to consider all three interests by engaging in a meaningful balancing of these interests, thus creating an affirmative duty. *See* § 365(a). No exception to the balancing requirement exists within the public benefit statutes. *See* 8 Del. C. §§ 361-68 (2013).

In this case, Defendant Directors had an affirmative duty to consider *all three interests* outlined in § 365 when they made decisions regarding the corporate governance of Praise Video. *See id*. Unfortunately, the record shows Defendant Directors did not comply with this affirmative duty and treated the public interest mission as dispositive of all other considerations regarding the merger transaction.

ii. Sections 362 and 365 are clear as to the existence of the tripartite balancing test but are ambiguous as to how it is applied to for-profit public benefit entities.

If a statute is reasonably susceptible to different conclusions or interpretations, it is ambiguous. *In re S'holders Litig.*, 789 A.2d 1176, 1199 (Del Ch. 2000). Where a statute is ambiguous and its meaning is not clear, the Court must rely on methods of statutory interpretation and construction to arrive at a meaning. *S'holders Litig.*, 789 A.2d at 1199. The fundamental rule in interpreting an

ambiguous statute is to ascertain and give effect to the intent of the legislature. *Id.* at 1200.

Applied to the tripartite balancing requirement in § 365, the language of the legislature is clear; however, the statute is replete with ambiguity as to its practical application. In order to give effect to the intent of the legislature, it is helpful to first examine the impetus behind the legislation.

a. *eBay* and the impetus behind public benefit corporations.

The leading case driving Delaware's public benefit legislation is *eBay Domestic Holdings, Inc. v. Newmark*. 16 A.3d 1 (Del. Ch. 2010). eBay launched an online classifies site designed to compete with craigslist[3]. *eBay*, 16 A.3d at 6. Unhappy with eBay's "foray into online classifieds," Newmark and Buckmaster asked eBay to sell its shares back to the company or to a third party that would be compatible with craigslist's unique corporate culture. *Id.* at 6. When eBay refused, Newmark and Buckmaster consulted with outside counsel for about six months and, in their role as directors, responded by: (1) adopting a rights plan that restricted eBay from purchasing additional shares and hampered its ability to freely sell the shares it currently owned; (2) implemented a staggered board which made it impossible for eBay to elect a director to the craigslist board; and (3) sought to obtain a right of first refusal in craigslist's favor. *Id.* As a result of these measures, eBay's ownership in craigslist was diluted from 28.4% to 24.9%. *Id.* at 7. The chancellor, using a heightened level of scrutiny,

[3] www.craigslist.org

determined the defendants breached their fiduciary duties and rescinded the rights plan but upheld the implementation of a staggered board. *Id.*

b. Pecuniary interests after public benefit legislation.

Ultimately, *eBay* demonstrates a situation similar to this case, where the defendants admit their goal was not the maximization of shareholder wealth. *See id.* at 34. ("No evidence at trial suggested that Jim or Craig conducted any informed evaluation of alternative business strategies or tactics when adopting the Rights Plan.") Although the chancellor in *eBay* noted there was nothing inappropriate about the company's mission, he reiterated,

> The corporate form in which craigslist operates, however, is not an appropriate vehicle for *purely philanthropic ends*, at least when there are other stockholders interested in realizing a return on their investment...Having chosen a *for-profit corporate form*, the craigslist directors are bound by the fiduciary duties and standards that accompany that form.

Id. at 34. (emphasis added and in original).

As a direct response to *eBay*, §§ 362 and 365 provide that "[d]irectors [] receive significant protections against claims by stockholders for disinterested decisions." S.B. 47, 147th, Assembl., Reg.Sess. (Del. 2013). Arguably these protections are not limitless. The legislative intent of the public benefit legislation "seeks to allow creation of public benefits corporations in the State. Public benefit corporations are defined as *for-profit entities* that are managed for both the financial interests of stockholders and the benefit of other persons…" House of Representatives Committee Report on Senate Bill 47 w/SA 1, Economic Development/Banking/Insurance/

Commerce Committee, http://www.leis.delaware.gov/Lis/Lis147.NSF/vw Legislation/SB+47?Opendocument (last visited Feb. 6, 2014)(emphasis added). Implicit in this statement of purpose is the recognition of a for-profit motive and financial interest that cannot be ignored. *See id.* Unlike nonstock/nonprofit corporate entities, the principle of the maximization of shareholder wealth is still embedded within the public benefit entity. *See id.*

eBay mandates the board must act in furtherance of the stated corporate purpose *under the laws for which it is formed*. *See eBay*, 16 A.3d at 34. In this case, the directors reorganized Praise Video into a corporate form which requires consideration of stockholder wealth. *See id.* at 34. Regardless of the public benefit label, Praise Video is remains a for-profit entity. As such, their failure to recognize the for-profit motives of the corporation and conduct the tripartite balancing test is a breach of fiduciary and statutory duties. *See id.*

iii. Defendant Directors failed to balance, or even consider, the tripartite balancing test.

Plaintiffs concede there may be instances where a stated public benefit purpose will override the pecuniary interests of the stockholders; however, this case is not one of those instances. The Gaming Option effectively prevented the board from considering the pecuniary interests of the stockholders because its exercise price was grossly unfair and precluded further competitive bidding. *See MacAndrew & Forbes Holdings, Inc. v. Revlon,Inc.*, 501 A.2d 1239, 1251 (Del. Ch. 1985) (a crown jewel lock up at a grossly unfair price precludes further competitive bidding), *aff'd*, *Revlon*, 506 A.2d 173.

Defendant Directors treated the public benefit purpose as dispositive of all future actions related to any merger negotiations by accepting New Hope's Gaming Option as a condition to any agreement regardless of the financial ramifications. In accepting such a provision, the only other bidder, Mercer, was precluded from any deal encompassing Praise Video's most valuable business segment. Faced with the serious unlikelihood Mercer would merge with Praise Video sans its major revenue generator, the only viable option was the proposed merger with New Hope. As such, the board was unable to conduct any sort of balancing to meet the requirements of § 365(a).

Further, the record demonstrates Defendant Directors did not engage in a meaningful tripartite balancing prior to acceptance of the Gaming Option. Bissinger's statements, along with at least one other board member, at the December 9, 2013 board meeting reiterated their concerns about the post-merger operations of the entity as contrary to Church values. As noted by the Chancellor and unrefuted by Defendant Directors, Bissinger stated he would not support a merger with Mercer *regardless of the difference between the two bid prices*. These statements show at least one member of the board, and potentially more than one Defendant Director, had no intention in considering the pecuniary interest of the stockholders.

iv. Defendant Directors did not satisfy their fiduciary duties to stockholders and the corporation under § 365(b) because no person of ordinary, sound judgment would approve.

Section 365(b) states, in pertinent part,

> with respect to a decision implicating the balance requirement in subsection (a) of this section, will be deemed to satisfy such director's fiduciary duties to stockholders and the corporation if such director's

> decision is both informed and disinterested and not such that no person of ordinary, sound judgment would approve.

In this instance, no person of ordinary, sound judgment would find Defendant Directors' actions satisfied their fiduciary duties for two reasons.

First, the stockholders were assured of a maximization of stockholder wealth before the bidding process began as a result of the Reorganization Merger. Defendant directors specifically told Praise Video stockholders the Reorganization Merger would allow the directors more legal flexibility to consider Mennonite values *as well as maximize stockholder wealth*. Instead, Defendant Directors ignored their financial obligation and gave New Hope a crown jewel 40% below fair value and contrary to any consideration, let alone maximization, of stockholder wealth.

Second, neither New Hope nor Mercer agreed to continue the public benefit provision post-merger. Although Praise Video specifically requested a term continuing the post-merger entity as a public benefit corporation in all bids, no bidder was willing to make such a concession. As such, the Merger required stockholders to give up substantial financial wealth based upon mere uncertainty with regard to the continuation of the public benefit mission. They gave up the difference in fair value of the Gaming Option as well as an increased per share price; no person of ordinary, sound judgment would agree to such a poor financial deal based on so few certainties.

CONCLUSION

A manager told to serve two masters (a little for the equity holders, a little for the community) has been freed of both and is answerable to neither. Michael P. Dooley *Two Models of Corporate Governance*, 47. Bus. Law 461, 470 (1992). This quote speaks directly to the reason the Praise Video board opted to restructure the company. They were seeking a way to sever any responsibility under "normal" corporate standards in order to defer any question as to their methods onto the public benefit aspect of the restructured business. Every for-profit corporation under Delaware law has the goal of wealth maximization and the board of directors is held to fiduciary standards of care and loyalty, regardless of the corporate form. The bedrock tenets of Delaware corporate law roar in opposition to handing directors of any corporation (let alone a public benefit corporation) carte blanche to take action without basic regard for stockholder wealth maximization.

The State of Delaware does not want to go down the path lain before it by Defendant Directors, choosing unchecked director actions over the normal fiduciary duties owed to the stockholders. *Revlon's* duties should be recognized in the area of public benefit corporation law and the statutory tripartite balancing test must be followed by all boards of public benefit companies in the case of merger and sale transactions. Without these principles directorial power has no "check" when the board can explain away any challenge to their action by stating "their public benefit concern is dispositive."