IN THE SUPREME COURT
OF THE STATE OF DELAWARE

PRAISE VIDEO, INC., JACOB BISSINGER, FRANCIS PENNOCK, MARK VAN ZANDT, HOWARD METCALF, AND PETER HORNBERGER,	:	
Defendants Below, Appellants,	:	No. 43, 2014
v.	:	
MERCER CHRISTIAN PUBLISHING CO. and SUSAN BEARD,	:	Court Below: Court of the Chancery for the State of Delaware
Plaintiffs Below, Appellees.	:	Civil Action No. 8974-CD

Appellant's Opening Brief

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February 7, 2014

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NATURE OF THE PROCEEDINGS

Appellants Praise Video, Inc. ("Praise Video" or the "Company"), a registered Delaware public benefit corporation; its directors: Jacob Bissinger, Francis Pennock, Mark Van Zandt, Howard Metcalf, and Peter Hornberger; New Hope Publishing Co. ("New Hope"), a Delaware corporation; and Praise New Hope Corp., a Delaware corporation (collectively "Appellants") file this appeal from the Court of Chancery's Memorandum Opinion submitted January 14, 2014 ("Opinion").

On December 9, 2013, Praise Video's board of directors (the "Board") approved a merger (the "Merger") between Praise Video and Praise New Hope Corp., a wholly-owned subsidiary of New Hope. In addition, the Board granted New Hope a conditional option (the "Gaming Option") to acquire Praise Video's gaming division.

Plaintiffs Mercer Christian Publishing Co. ("Mercer") and Susan Beard (collectively "Plaintiffs") commenced this action in the Delaware Court of Chancery on December 13, 2013 seeking a preliminary injunction against the Board from submitting the proposal to a vote by Praise Video's shareholders Specifically, Plaintiffs claimed that the Board breached its fiduciary duty by considering religious goals in its merger decision process, and, in the alternate, that it impermissibly made such religious goals dispositive in its decisions. Plaintiffs also challenged the Gaming Option, claiming it unfairly influences Praise Video shareholders to vote in favor of the Merger.

On January 14, 2014, Chancellor Sean Develin granted Plaintiff's motion for a preliminary injunction. The court declined to rule on Plaintiff's claims regarding the merger decision, but ruled in favor

of Plaintiffs regarding the Gaming Option. A preliminary injunction order was issued on January 15, 2014, enjoining Praise Video from merging with New Hope. Mercer Christian Publ'g Co. v. Praise Video, Inc., No. 8974-CD (Del. Ch. Jan. 15, 2014) ("Prelim.Order"). Accordingly, Praise Video, the Board, New Hope and Praise New Hope appeal the Court of Chancery's Order under Del. Const. art. IV §11 and Supr. Ct. R. 7.

SUMMARY OF THE ARGUMENT

This case presents two issues rich in precedent but profoundly revolutionized by recent codification of a novel form of business organization. *See*8 Del. Code Ann. tit. 8, §361-68 (2013).Both issues turn on the appropriate level of business judgment deference that is properly afforded a board of directors elected by a majority of a corporation's shareholders. The decision by the Court of Chancery below not only fails to distinguish this case in light of Delaware's recently enacted public benefit corporation statutes but also significantly departs from established jurisprudence.

First, the Chancery Court erroneously applied the standard set by *Blasius v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988), to a board decision that has traditionally enjoyed business judgment deference. The Court-below failed to distinguish the context, purpose and effect requisite to trigger a heightened level of scrutiny under *Blasius*. In addition, the Court failed to consider the Board's fiduciary duties, mandated under §365(b), as a compelling justification for its action. For these reasons, the Court of Chancery's decision should be reversed.

In addition, this Court must rule where the Chancery Court feared to tread and bring deference under the business judgment rule into harmony with the standard articulated in §365(b). Directors of public benefit corporations, such as Praise Video, are statutorily mandated to balance the public benefit with stockholder interests. This Court has never second-guessed valid business judgments of a fiduciary acting in good faith and with due care. It should not do so now.

STATEMENT OF FACTS

Praise Video is a registered Delaware public benefit corporation with offices in Lancaster, Pennsylvania. Praise Video engages in the production and distribution of filmed and digital entertainment of a wholesome nature. In its certificate of incorporation it identifies as its public benefit the "promotion of the values articulated in the Confession of Faith in a Mennonite Perspective. Opinion 8.

Jacob Bissinger is the CEO of Praise Video and owns approximately 22% of Praise Video's outstanding shares. Francis Pennock, Mark Van Zandt, Howard Metcalf, and Peter Hornberger, along with Bissinger and Samuel Holbrook, constitute Praise Video's board of directors. The board members, excluding Bissinger, own 4% of Praise Video's shares.

Mercer is a corporation with its headquarters in Coral Gables, Florida. Mercer engages in business related to the publishing and distribution of Christian faith-based media content. Mercer holds approximately 2% of Praise Video's shares. Susan Beard is a Praise Video shareholder owning approximately 3% of its outstanding shares.

New Hope is a registered Delaware corporation. New Hope's majority (80%) stockholder is Miller Price L.P. ("Miller Price"), a Delaware limited partnership. After Miller Price, Pennock is the most significant stockholder of New Hope. Praise New Hope, Inc. ("Praise New Hope") is a wholly-owned subsidiary of New Hope.

From the mid-1970's until September 2013, Praise Video was organized as a Delaware corporation (hereafter "Old Praise Video" or "OPV"). Old Praise Video's mission was to provide an alternative to violent or sexually offensive entertainment generally offered by

secular media. Opinion 4. In early 2013, Bissinger informed the Board of his decision to retire as CEO of Old Praise Video and sell his shares of OPV's common stock. The Board promptly retained financial adviser Norman Stoltzfus to explore transactions in which OPV stockholders would be able to liquidate their investment. By June, Stoltzfus had identified several potential bidders including Mercer, which proposed an all-cash acquisition of OPV. Opinion 7.

On June 24, 2013, Stoltzfus reported on Mercer's proposal. Stoltzfus relayed that Mercer planned to leverage Old Praise Video's gaming department in the development of combat-oriented video games. This revelation provoked considerable alarm for several of the directors, who expressed concern about the effect of Mercer's plans on Praise Video's corporate mission. So as to legally consider Praise Video's values in any future plans, the Board moved to reorganize OPV as a public benefit corporation ("Reorganization Merger") per §363. After Board and shareholder (over 90%) approval, the Reorganization Merger became effective September 30, 2013.Opinion 9.

In addition, Pennock and Miller Price formed New Hope and submitted a bid to merge Praise Video with New Hope's wholly-owned subsidiary, Praise New Hope. As part of its bid package, New Hope also requested that Praise Video grant New Hope an option to acquire Praise Video's gaming division for $18 million. The Gaming Option would only become exercisable if (A) the merger agreement with New Hope is terminated, and (B) within twelve months of such termination Praise Video enters into a definitive agreement to be acquired. In exchange for the Gaming Option, New Hope undertook that Pennock would be the

CEO of Praise Video following an acquisition, and that he would operate Praise Video in a manner consistent with its public benefit.

In mid-November 2013, Mercer and New Hope submitted bids, of $50 per share and $41 per share, respectively. The Board met on December 9, 2013, for over seven hours, to evaluate and determine how to respond to the bids. As plaintiffs acknowledge, there was nothing material lacking in the Board's informational base. After careful evaluation of the New Hope and Mercer bids, the Board voted (4-1, with Holbrook dissenting and Pennock absenting himself) to approve New Hope's bid and the Gaming Option. On December 13, 2013, Plaintiffs brought this action to enjoin the Merger.

Plaintiffs claim the Board breached its fiduciary duty in approving both the Merger and Gaming option. The Court of Chancery found that the Board approved the Merger because they found it "appropriately balanced the stockholders' pecuniary interests, the best interests of those materially affected by Praise Video's conduct, and the public benefit identified in its certificate of incorporation." Opinion 11.

Turning to the Gaming Option, the Court-below properly found that the Board approved it because it would "favor and facilitate the consummation of the bid that achieved the balance previously approved by the majority of the directors." Opinion 12. However, despite this finding, the Court applied a standard first articulated in *Blasius* v. *Atlas Co.* and held that the Board "intentionally deprive[d] the stockholders of their statutorily-mandated right to vote on a merger." The Court granted plaintiffs the injunction. Opinion 16.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN FAILING TO APPLY THE BUSINESS JUDGMENT RULE TO THE BOARD'S APPROVAL OF THE GAMING OPTION AND FURTHER ERRED BY CONCLUDING THAT THE BOARD'S DECISION FAILED UNDER THE *BLASIUS* STANDARD OF REVIEW.

A. Questions Presented

1. Whether the Court of Chancery erred by not applying the business judgment rule to a board decision after finding the directors acted in good faith to further the interest of the corporation?

2. Whether fulfilling a statutorily-mandated fiduciary duty meets the compelling justification standard under *Blasius*?

B. Standard of Review

This Court reviews the Court of Chancery's determinations *de novo* for errors in "formulating or applying legal precepts." *Stroud v. Grace*, 606 A.2d 75, 91 (Del. 1992) (citing *Gilbert v. El Paso, Co.*, 575 A.2d 1131, 1142 (Del. 1990)). This is the appropriate standard because the Court of Chancery erroneously held defendants to a heightened level of scrutiny under the *Blasius* standard instead of granting deference under the business judgment rule. A *de novo* standard of review is also appropriate for reviewing the Court of Chancery's failure to consider appellants' compelling justification for overcoming the *Blasius* standard.

C. Merits

1. The Business Judgment Rule is the appropriate standard for reviewing the Board's decision to approve the Gaming Option.

The Delaware legislature, through 8 Del. Code Ann. tit. 8, §141 (2013), has vested in the board of directors the authority to manage a

corporation. In deference to this authority, this Court begins its analysis of board decisions under the presumption of the business judgment rule. *See Williams v. Geier*, 671 A.2d 1368, 1377-78 (Del. 1996); Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984). Under this rule, the plaintiff bears the burden of rebutting the presumption that "in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Unitrin, Inc. v. American Gen. Corp.,*651 A.2d 946, 1373 (Del. 1995)(quoting *Aronson,* 473 A.2d 805, 811**)**.If this presumption is not rebutted, a "court will not substitute its judgment for that of the board." *Unocal Corp. v. Mesa Petroleum Co.,* 493 A.2d 946, 954 (Del.1985).

Despite findings of fact that support application of the business judgment rule, the Court of Chancery refuted its applicability. In reviewing the Board's decision to approve the Merger and the Gaming Option, the Court of Chancery found that the Board "carefully evaluated the details of the New Hope and Mercer bids" and that "there was nothing material lacking in the directors' informational base." Opinion 10-11. In addition, the Chancellor found that the Board "acted with the utmost good faith" to "promote the public benefit identified in [the] certificate of incorporation." Opinion 16.These findings only embolden the presumption under the business judgment rule. In fact, the Court-below points to nothing in the record indicating the Board acted in bad faith, lacked adequate information, or acted for a purpose other than the promotion of the stated corporate interest.

2. The *Blasius* standard is inappropriate for judicial review of the Gaming Option.

The Court of Chancery further erred by extending the logic in *Blasius v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988), and its progeny to the Board's decision regarding the Gaming Option. The reasoning used by the Court is misguided because it fails to distinguish the facts of this case from the distinct context, intent, and effect requisite to trigger enhanced scrutiny under *Blasius*.

a. Blasius is inappropriate outside of actions touching upon a contested election of directors.

Because the arduous scrutiny demanded by *Blasius* is ill-suited for most board decisions, Delaware courts have only upheld *Blasius* claims under extraordinary circumstances. *Williams*, 671 A.2d at 1377. Hence, *Blasius* scrutiny is best untouched absent board action which precludes the exercise of shareholders' franchise during a contested election for directors. *In re MONY Grp. S'holder Litig.*, 853 A.2d 661 (Del. Ch. 2004) ("*Blasius* involved a contest to elect a new board majority and draws its strong doctrinal justification from that context"). In such contexts, the heightened standard of scrutiny protects the core "ideological underpinning upon which the legitimacy of directorial power rests." *Blaisus*, 564 A.2d at 659.Thus, Delaware courts have properly applied *Blasius* to contexts where the board action either (1) impermissibly impedes or delays the shareholder vote of an opposing slate of directors or (2) effectively negates a victory achieved by a majority of stockholders in an election of directors. *Kidsco Inc. v. Dinsmore*, 674 A.2d 483, 495-96 (Del. Ch. 1995).

The Court of Chancery failed to properly distinguish this case for not touching upon a contested election of directors. First, nothing in the record supports even an inference that the Board's decision affected an election of directors. There was no finding that the incumbent Board faced any opposition in an upcoming election. Moreover, nothing in the record suggests that the Board's decision negates actions taken by a majority of the Company's shareholders. In fact, there is no evidence the Board contradicted the will of such a majority. To the contrary, the Court-below found that barely three months prior to bringing this action over 90% of the Company's shareholders voted, without any claim of coercion or fraud, to endorse both the Board's actions. Opinion 5. This ringing endorsement confirms the Board acted with the full support of a majority of stockholders.

b. *Blasius* scrutiny is only triggered when the primary purpose of the board's action is to interfere or impede a shareholder vote.

The Court of Chancery also erred by not properly considering the primary purpose behind the Board's approval of the Gaming Option. This Court has held that *Blasius* applies when "the primary purpose of the board's action is to interfere with or impede exercise of the shareholder franchise." *MM Companies, Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1130 (Del. 2003). However, *Blasius* scrutiny is not appropriate when a legitimate board action has the incidental effect of influencing shareholders' voting rights. *See Williams*, 671 A.2d at 1376. The "primary purpose" requirement is most aptly demonstrated when an incumbent board's judgment is dominated by a desire to retain power. *Portnoy v. Cryo-Cell Int'l, Inc.*, 940 A.2d 43, 69-70 (Del. Ch.

2008)("the subjective motivations of the defendants [are] extremely important . . ., particularly when insiders are undertaking actions designed to aid their own efforts to retain office").

The Court of Chancery errs by failing to apply a "primary purpose" standard in its assessment of the Board's decision. First, rather than ruling on the Board's primary purpose, the Court of Chancery found that the directors "intentionally deprive[d] the stock-holders of their statutorily-mandated right to vote." Opinion 16.Such language conflates an intentional act with an act performed for the primary purpose of achieving an intended result. Although the record supports, and it is further admitted, that the Board acted with due diligence and intent, this is a far cry from a determination that they acted for an impermissible purpose. By failing to make a clear finding on the Board's primary purpose, the Court of Chancery drastically departs from *Blasius* and its progeny.

Additionally, the Chancellor points to nothing in the record that indicates the Board members acted in self-interest, whether to perpetuate themselves in office or otherwise. To the contrary, the approved Gaming Option serves a contrary purpose by promoting a merger that would dissolve the Board. Furthermore, stock-holding Board members voted against their own pecuniary interest to approve a merger that would provide a lower price per share. Opinion 4. Plaintiffs made no claim, and the Court-below did not find, that directors lack sufficient independence or were otherwise impermissibly influenced.

Finally, although the Chancellor failed to rule on the Board's primary purpose, he found that the Board acted to "favor and

facilitate the consummation of the bid that achieved the balance" between shareholder and public interests. Opinion 12. Such a finding is inconsistent with the primary purpose required by a *Blasius* claim.

c. The Gaming Option is neither preclusive nor coercive.

The Court of Chancery erred in its decision to apply *Blasius* because the Gaming Option does not deprive stockholders of a meaningful vote on the merits of the Merger. This Court has emphasized that "[c]areful judicial scrutiny will be given a situation in which the right to vote for the election of successor directors has been *effectively frustrated and denied*." *Liquid Audio, Inc.*, 813 A.2d at 1127 (emphasis added). However, courts have refrained from imposing heightened scrutiny in cases where shareholders retain "the powers of corporate democracy." *Unocal*, 493 A.2d at 959.

In cases involving defensive measures, this Court has repeatedly incorporated *Blasius* analysis in the standard of scrutiny applied under *Unocal*. *Liquid Audio, Inc.*, 813 A.2d at 1129; *See Unocal*, 493 A.2d. 946. Even if *Unocal* and its progeny do not directly control, its analysis of impermissible effect indicates circumstances in which the *Blasius* standard is inapplicable. Following *Unocal*, board actions may not be either preclusive or coercive. *Unitrin, Inc.*, 651 A.2d at 1387. A board action is preclusive when it "makes a bidder's ability to wage a successful proxy contest and gain control either 'mathematically impossible' or 'realistically unattainable.'" *Versata Enter., Inc. v. Selectica, Inc.*, 5 A.3d 586, 601 (Del. 2010). Alternatively, an action is coercive if it "ha[s] the effect of causing the stockholders to vote in favor of the proposed transaction for some reason other than

the merits of that transaction." *Brazen v. Bell Atl. Corp.*, 695 A.2d 43, 50 (Del. 2003)(citing *Williams*, 671 A.2d at 1382-83). In *Brazen*, no coercion was found where a board's decision to approve a merger with a $550 million termination fee. *Id.* at 50.

Here, the Court-below found that the Board "deprive[d] the stock-holders of their statutorily-mandated right to vote." Opinion 16. This finding is plainly erroneous. First, the Gaming Option does not, in fact, withhold the vote from the Company's shareholders. Complete consummation of the merger still requires approval of a two-third majority of current shareholders. Del. Code Ann. tit. 8, 363(c)(2).The Board's proposal would have been put to a shareholder vote had this litigation not intervened. Second, the Gaming Option does not, in effect, preclude the outcome of a shareholder vote. Rejection of the Merger is not only mathematically possible but highly likely if a supermajority of shareholders do not favor the bid. The Board in total owns26% of the common stock, a holding that is grossly insufficient to preclude an alternative outcome.

The Board's action also falls well short of stockholder coercion. The Gaming Option it not outside the merits of the transaction but rather creates an appropriate monetary valuation of all elements within the transaction. Because Praise Video's stated public benefit is, by its very nature, an intangible and nonmonetary asset, the Gaming Option provides a reasonable assessment of its worth through a devaluation of the gaming division. Plaintiffs fail to demonstrate how such a pricing structure is unreasonable under the mandate placed on the Board by the public benefit corporation statutes of this state.

3. The Court of Chancery erred by failing to consider the Board's compelling justification for its action.

After erroneously deciding to apply *Blasius*, the Court of Chancery ultimately errs by disregarding any consideration of the Board's compelling justification for approving the Gaming Option. It is well settled that the *Blasius* standard is not a *per se* rule. *Liquid Audio*, 813 A.2d at 1128 (citing *Blasius*, 564 A.2d at 661). The enhanced judicial scrutiny applied under *Blasius* may be overcome by demonstrating a compelling justification for such action. *Id.* In *Blasius*, the Court held the board's claim that they knew "better than do the shareholders what is in the corporation' best interest" did not achieve such a standard. *Blasius*, 564 A.2d at 663.

The Court below errs by entirely foregoing any analysis of the Board's claim of a compelling justification. Furthermore, it is unclear whether the *Blasius* court's rejection of board paternalism would fail as a compelling justification under Delaware's recently adopted public benefit corporation statutes. These statutes shift the duties of the board of directors and fundamentally alter the incentives of the shareholders in relation to "what is in the corporation's best interest." The Board's compelling justification claim, that the Board knows better how to appropriately balance the corporation's stated public benefit with the interest of shareholders, is a different question than that addressed by *Blasius* or any of its progeny to this point. As such, it creates unique and untested legal footing. As a case of first impression, it is clearly erroneous that the Court-below would fail to reflect on such an important issue.

II. THIS COURT SHOULD EVALUATE PRAISE VIDEO'S DECISION TO MERGE WITH NEW HOPE UNDER THE BUSINESS JUDGMENT RULE.

A. Question Presented

1. Whether Praise Video is entitled to deference under the business judgment rule for considering its statutorily-mandated obligations to its incorporated public benefits in a voluntary merger decision?

B. Standard of Review

"The Court of Chancery's legal conclusions are subject to *de novo* review by this Court." *Unitrin,* 651 A.2d at 1385 (citing *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992)). Because the Court of Chancery declined to address this issue, it is left for this Court to resolve *de novo*.

C. Merits of Argument

Recognizing both the need for board autonomy in managing corporate affairs and the unworkability of a case-by-case analysis of every board decision, it is well settled that Delaware courts do not probe into the rationale of specific decisions absent a showing of fraud or gross abuse. *Warshaw v. Calhoun*, 221 A.2d 487, 493 (Del. 1966) (citing *Moskowitz v. Bantrell*, 190 A.2d 749, 750 (Del. 1963)). Delaware courts refuse to place themselves in the boardroom and analyze *ex post* the value of particular board decisions. *Paramount Communications, Inc. v. Time Inc.*, 571 A.2d 1140, 1151 (Del. 1989).

Delaware law further limits judicial scrutiny of the boards of Public Benefit Corporations. The statute codifies a presumption that all decisions meet the balancing requirement so long as the decisions

are "informed and disinterested and not such that no person of ordinary, sound judgment would approve. Del. Code Ann. tit. 8, §365(b) (2013).This enhanced dereference no doubt stems from the complex balancing explicitly required of the directors of public benefit corporations. *See* Del. Code Ann. tit.8, § 362(a) (2013).

In choosing the party with whom Praise Video would merge, the Board did exactly that: it balanced the immediate stockholder return between bidders with its incorporated goals of the Mennonite faith.

Plaintiffs now ask this Court to determine the precise actuarial value of the various constituencies considered, and arrive at a different outcome. This Court should decline to do so.

1. Praise Video's decision to merge with New Hope merits substantial judicial deference under the Business Judgment Rule.

a. The text of §365(a) requires application of the business judgment rule to all business decisions by the board of Public Benefit Corporations.

Within the text of Delaware's public benefit corporation statutes, the legislature explicitly carves out the appropriate standard of review for decisions made under its subchapter. §365(b) states that the fiduciary duties of directors are met where their decisions are "informed, disinterested, and not such that no person of ordinary, sound judgment would approve." §365(b). This language mirrors the words of this court in its application of the business judgment rule. *Unitrin, Inc.,*651 A.2d at 1373 (that directors acted on "an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company").

However, within the remainder of that section, the legislature fashions a new corporate entity in which traditional fiduciary duties

owed by a board of directors would not be beholden solely to the pecuniary interests of the shareholders. Del. Code Ann. tit. 8, §365(a) (2013).Instead, directors of such entities must balance these interests with "the best interests of those materially affected by the corporations conduct, and the specific public benefit . . . identified in its certificate of incorporation." Id. In this way, the legislature expanded the business judgment rule to circumstances where it was previously passed over.

In the present case, Praise Video concedes that it considered its stated public benefit, Mennonite values, in its decision to merge with New Hope. However, by a harmonizing of §365(a) and (b), this does not amount to a claim for a breach of fiduciary duty. Under these circumstances, the Board was statutorily-mandated to serve both the public interest and the interest of the shareholders. It is therefore statutorily-entitled to business judgment deference.

b. Religious goals are an expressly permissible public benefit for consideration under §365(b).

Plaintiffs contend that Praise Video, as a for-profit entity, cannot consider religious goals in its merger consideration. However, this flies in the face of the direct text of §361, which explicitly lists religious goals as a permissible public benefit. Because the Delaware legislature did not intend to create a law with no effect, Plaintiff's claim amounts to a demand that this Court find the law unconstitutional.

Plaintiff's sole authority on this point derives from a misreading of a Third Circuit opinion stating that a for-profit, secular corporation cannot claim First Amendment privilege under the

Freedom of Religion clause. *Conestoga Wood Specialties Corp. v. Sec'y of Health and Human Serv.*, 724 F.3d 377, 388 (3d Cir. 2013). However, the decision contemplates no bar to any religious activity or speech which does not otherwise conflict with the law or Constitution – it merely precludes such a corporation from proactively using the First Amendment as a shield against compliance with state or federal laws. Praise Video claims no First Amendment protections, but instead maintains that the actions of the board are permissible under §365(a).

c. Praise Video was required to balance its incorporated public benefit with shareholder pecuniary interest at all times, including merger decisions.

The balancing of interests set forth in §365(a) applies to "the business and affairs of the public benefit corporation."§365(a). Nothing in the statute places any limitation on the corporation's "business and affairs". Rather, §361 subjects public benefit corporations to all the provisions affecting corporations that are left intact by that subchapter. The board is thereby granted the authority to negotiate and approve mergers agreements. Del. Code Ann. tit. 8, §251(b) (2013).

Plaintiffs contend that the Board could not consider Praise Video's public benefit interest in accepting a cash-out merger offer because the corporation and, by association, the public benefit thus cease to exist post-merger. This argument defies logic.

First, the statute creates no such limitation. The statute explicitly mandates that boards balance interests in all "business and affairs." Claiming that such duties are relieved when the board is faced with a cash-out merger is tantamount to claiming that all

fiduciary duties are relieved when the future of the corporation is no longer considered. This Court's precedent states that it is in these circumstances where the strength of fiduciary duty is heightened, not diminished. See *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 179 (Del. 1986).

In application, limiting public benefit considerations for mergers would create a chilling effect on mergers by public benefit corporations. If, as Plaintiff envisions, the mere act of merger consideration ended a public benefit corporation's non-pecuniary goals, then initiating any kind of merger discussion would become a dangerous proposition to corporations that are intent on furthering their public benefit goals. Public Benefit Corporations would eschew merger discussions for fear of losing control over their ability to back out or steer merger negotiations in a beneficial manner. A decision to curtail such organizational flexibility would be detrimental to business interests and threaten to undermine Delaware's leadership role in corporate law.

2. Praise Video's directors fairly balanced shareholder and public benefit interests under 365(b).

Plaintiffs' contention that the Praise Video board focused exclusively on the public benefit to the exclusion of the shareholder interest is unsupported by the record. Plaintiffs rely on a single statement by Bissinger, who stated that he was not comfortable with Mercer's proposed expansion into violent video games at any share price. Were this statement matched with repeated action by Bissinger against 'any share price,' one in which any reasonable individual would disagree, Plaintiff might have a substantial basis to show that

this opinion factored significantly into Bissinger's vote. The only inference that can be reasonably drawn on the actual record is that Bissinger valued the public benefits of Praise Video more than the price differential between Mercer and New Hope, at a valuation of$9/share. This difference is not sufficiently vast to make any countervailing consideration necessarily inadequate.

Even if Plaintiffs could show that Bissinger failed to balance the public benefit and the shareholder's interest, Plaintiff has still not stated a claim sufficient to overcome the business judgment presumption. This court has held that one interested director does not deprive the entire board of the benefits of the business judgment presumption. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 363 (Del. 1993).Thus Plaintiffs must present demonstrate that either a majority of directors possessed impermissible interests, or that the interested director impermissibly influenced the Board's decision-making process.

The record does not support such inference and hence this Court should not create one. Second-guessing business decisions, even imperfect ones, is unwise absent evidence of a failing in director loyalty or care. *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 45 (Del. 1994). Further investigation into the specific weight attributed to the public benefit by the Praise Video board would impose judicial analysis onto business valuation.

3. *Revlon*'s enhanced scrutiny does not apply to Praise Video's merger decision.

The court below contemplates, though does not definitively rule on, *Revlon*'s applicability to public benefit corporations. Opinion 15. Under *Revlon*, corporations facing inevitable dissolution through an

all cash-out merger must solely focus on maximizing immediate shareholder value. *Revlon*, 506 A.2d at 182 (Del. 1986).

Revlon is inapposite here for two reasons. First, *Revlon*'s enhanced scrutiny should not be triggered in analyzing Praise Video's decision to merge with New Hope and rejection of Mercer's offer because dissolution was not inevitable. A merger with either Mercer or New Hope was one option amongst many potential choices stemming from initial non-urgent action by Praise Video. Second, public benefit goals are permissible as a factor even in the face of dissolution. The public benefit goal perpetuates beyond the life of the corporation in a way that traditional corporate stakeholder concerns do not, and the text of §365(b) does not contemplate any restrictions on the applicability of the public benefit consideration.

a. Revlon's enhanced scrutiny should not apply because Praise Video's merger was not inevitable.

This court has held that *Revlon*'s enhanced scrutiny is triggered in analyzing merger decisions only when circumstances require the corporation to abandon its strategic plan or make a sale of the corporation inevitable. *Time*, 571 A.2d at 1151. Directors need the flexibility to contemplate, negotiate, and recommend courses of actions regarding potential mergers — such decisions fall under the business judgment rule. *Id.* When the corporation is faced with a hostile bidder or has conclusively declared the company for sale, the corporation's inevitable dissolution invalidates other considerations that presuppose the corporation's long term continuation. Accordingly, for traditional corporate organizational structures, the

only remaining permissible consideration by the board is the shareholder value.

A merger was not inevitable for Praise Video – so the board's recommendation to the shareholders of a particular course of action did not mean that said merger would be consummated. The intent of *Revlon* and its progeny are to protect shareholder rights – recommendations and defensive measures by the board cannot be coercive or preclusive if the shareholders have a meaningful right to vote against the transaction with no consequence for the business. *See Revlon*, 506 A.2d at 182 (Persistent hostile bidder); *Omnicare, Inc. v. NCs Healthcare, Inc.,* 818 A.2d 914, 930 (Del. 2003) (Insolvency requiring sale of company).

The Praise Video directors decided to pursue a particular merger option, and moved forward to put said merger to shareholder vote. The shareholders were perfectly capable of rejecting the offer and continuing the business; nothing would force the shareholders into adopting a particular resolution. Merger discussions by Praise Video were initiated not because of outside interest or from financial problems within, but rather because one director wished to liquidate his holdings in Praise Video. Likewise, the majority of shares were not held by affiliated and interested parties such as the directors, such that minority shareholders would necessarily have no voice in the proposed transaction. *See QVC,* 637 A.2d at 42.

The shareholders had the power and realistic opportunity to reject the proposed merger. Thus, the recommendation by the board could not have been coercive or preclusive. This Court has held that

actions by the board are preclusive if it deprives stockholders of the right to receive tender offers from other bidders, which might apply to a lock-up provision such as the Gaming Option. *Omnicare*, 818 A.2d at 935. However, the ephemeral timeframe on the provision (effectual for one year only) does not create an inevitable pressure in the near or long term for shareholders to vote a certain way. Praise Video's directors were not stuck with deciding how best to dissolve the company, and accordingly were not limited to maximizing immediate shareholder value. In the course of friendly merger negotiations under Del. Code Ann. tit. 8, §251(b) (2013), corporate boards have the latitude to accept or deny offers using their ordinary range of constituency considerations. *Pogostin v. Rice*, 480 A.2d 619, 627 (Del. 1984). Without this leeway, the mere act of entering into merger discussion 'would rob corporate boards of all discretion, forcing them to choose between accepting any tender offer . . . or facing the likelihood of personal liability if they reject it.' *Id*.

CONCLUSION

For the foregoing, the Court of Chancery's January 23, 2014 Memorandum Opinion and Order should be REVERSED.

Respectfully Submitted,

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