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., Defendants-Below, Appellants, V. MERCER CHRISTIAN PUBLISHING CO. and SUSAN BEARD, Plaintiffs-Below, Appellees.	No. 43, 2014

ON APPEAL FROM
THE COURT OF CHANCERY
FOR THE STATE OF DELAWARE

APPELLEES' BRIEF

LAW FIRM F
ATTORNEYS FOR PLAINTIFF BELOW,
APPELLEES

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NATURE OF THE PROCEEEDINGS

Defendants 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., appeal the judgment rendered by the Court of Chancery of the State of Delaware on January 14, 2014 ("Op."), granting Plaintiffs Mercer Christian Publishing Co. and Susan Beard a preliminary injunction. Defendants appeal to this Court to overturn the order enjoining them from taking any action to effectuate, enforce, or consummate any term or provision of the Merger Agreement between Defendant Praise Video, Inc. ("Praise"), and Defendant New Hope Publishing Co. ("New Hope").

Praise began thinking about a merger in early 2013, and discussed it with Mercer Christian Publishing Co. ("Mercer"). Praise then set out to find more bids, and received a bid from Mercer for $50, and New Hope for $41. The board of directors (the "board") voted in favor of New Hope's bid, but still needed stockholder approval. (Op. 11, 12). Plaintiffs sought a preliminary injunction of the merger because Praise did not act in accordance with the Public Benefit Corporation ("PBC") Statute, and because the board's actions conflict with stockholders' rights to vote on a transaction. (Op. 14, 15).

The Court of Chancery granted the preliminary injunction, and this appeal follows.

SUMMARY OF ARGUMENT

The preliminary injunction should be upheld, as the board, with the exception of Director Samuel Holbrook ("Holbrook"), disregarded the balancing mandate in the PBC statute. Furthermore, as a for profit corporation, Praise has no corporate interest in promoting religious values, and even if it does, it cannot take this into consideration when it merges with another entity.

Praise is a PBC, and is required by statute 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. Del. Code Ann. tit. 8, § 362. Praise only concerned itself with its religious interests, thus violating the statute. Although Praise is a PBC with religion as its stated benefit, it cannot use this to get around the basic corporate principle that corporations have no religious interest. And even if it could, such an interest cannot be taken into consideration when the corporation ceases to exist.

Also, the preliminary injunction must be upheld because the board interfered with a stockholder vote on the New Hope bid. The board's use of a crown jewel provision coerced shareholders to vote for the New Hope bid even if stockholders preferred the Mercer bid. Furthermore, the board lacks a compelling justification for its actions. Thus, the appellee has shown a high probability of success on the merits, and the preliminary injunction should be upheld.

STATEMENT OF FACTS

Old Praise Video was a for profit corporation formed in the mid-1970s with Jacob Bissinger ("Bissinger") as a director and CEO. (Op. 3). It always engaged in production and distribution of entertainment that it described as a wholesome nature and an alternative to violent or offensive entertainment. (Op. 3-4). In 2003, it started making

Christian video games. (Op. 4). Recently, it has averaged $4 million in earnings, with roughly 60% of profit from the video games. (Op. 4).

Bissinger owned approximately 22% of Old Praise's common stock. (Op. 4). Combined, the other directors own about 4%. (Op. 4). The entire board, and most of the 250 shareholders, are, or are related to, members of the Mennonite Church USA (the "Church") (Op. 4).

This case arises from Bissinger's decision in early 2013 to retire within a year. (Op. 6). He explored ways to diversify his assets, and decided to sell his Old Praise stock. (Op. 6). After he informed the board, the board hired financial advisor Norman Stoltzfus ("Stoltzfus") to find ways liquidate Old Praise. (Op. 6).

By early June 2013, Stoltzfus identified some bidders to buy out Old Praise's shares, the first one being Mercer (Op. 7). Mercer has strong ties to Christianity, and is a wholly owned subsidiary of Mercer Media Inc., a secular conglomerate. (Op. 5). Upon learning that Old Praise had intentions to sell, Mercer expressed an interest, largely based on Old Praise's profitable gaming division. (Op. 7). It stated that it might be willing to pay over $40 per share. (Op. 7).

On June 24, 2013, the board met to discuss a potential Mercer buyout. (Op. 7). The board was pleased the potential bidder shared its Christian values. (Op. 7). But its feelings changed when it learned that Mercer might increase profits by producing combat video games. (Op. 7). Bissinger and Director Howard Metcalf ("Metcalf") were particularly displeased with this idea, and said it violated their religious obligations. (Op. 8). At this point, Holbrook expressed two concerns. (Op. 5-6, 8). First the directors should not be concerned with how Old Praise operates after a buyout, and that stockholders need to evaluate their own objections to selling themselves. (Op. 8). Second, that the directors have a duty to achieve the highest price for the stockholders regardless of their personal beliefs. (Op. 8).

Following Holbrook's comments, the directors asked Stoltzfus to increase efforts to identify bidders, then asked its lawyers about its legal obligations. (Op. 8). The lawyers said that based on Old Praise's legal status, the board needed to get the highest bid, but that it may not need to if it reorganized as a PBC. (Op. 8).

In September 2013, the board took this advice and sought to reorganize as a PBC. (Op. 8). This required a majority of the board's approval, as well as 90% of the outstanding shares. (Op. 5). The board, with Holbrook dissenting, approved the reorganization merger (Op. 8). The board presented the reorganization merger to the stockholders and explained the PBC Statute. (Op. 8). It said that it was exploring a sale, and that if it was a PBC, it could take into consideration Church values, and allow it to maximize financial wealth. (Op. 8, 9). The vote passed, and Praise was born. (Op. 9).

Following the reorganization merger, Stoltzfus continued his search for potential bidders. (Op. 9). Director Francis Pennock ("Pennock") told Stoltzfus that he could submit a bid equal to Mercer's preliminary offer. (Op. 9). To do this, Pennock joined forces with Miller Price, a partnership consisting of Isaac Miller ("Miller"), and Stephen Price ("Price"). (Op. 6). Together, they formed New Hope to acquire Praise. Pennock owned 20%, and Miller Price owned 80%. (Op. 6). Miller is a member of the Church, Price is not.

(Op. 6). Their partnership agreement says that if any deadlock cannot be settled within 60 days: one partner must sell to the other, both must sell to a 3rd party, or the company must be liquidated. (Op. 6).

By mid November 2013, Stoltzfus directed Mercer, New Hope, and three other bidders to submit bids by December 5, 2013. (Op. 9). Only Mercer and New Hope submitted bids. Mercer bid $50 per share, while New Hope bid $41 per share. (Op. 9). The terms were similar, but New Hope had an additional demand. (Op. 10). In the event that the stockholders voted against the merger, it sought a crown jewel provision, or Gaming Option, which would allow it to purchase Praise's Games Division at a 40% discount, or some $12 million below market value. (Op. 10). To secure this provision, New Hope stated that Pennock would be the CEO following the acquisition, and that so long as he was CEO, it would be run consistent with Church values. (Op. 10). But despite New Hope's alleged devotion to the Church, like Mercer, it did not agree to a PBC clause as Praise requested. (Op. 9). On December 9, 2013, the board met to evaluate the bids. (Op. 10). It is undisputed that the board was well informed, and that outside of these two bids, no better bids would be forthcoming. (Op. 11).

But there was friction over Mercer's ability to promote Church values. (Op. 11). Again, Bissinger and Metcalf expressed concerns that Mercer may expand its operations into combat like games. (Op. 11-12). And even though they recognized the religious integrity of Mercer, they were concerned that the conglomerate that owned Mercer would impinge on Mercer's religious mission. (Op. 11). After evaluating the bids, the board voted 4-1 in favor of New Hope, with Holbrook dissenting, and Pennock absenting. (Op. 11). The board said its decision "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." (Op. 11). However, it is uncontradicted that Bissinger and Metcalf were deeply concerned, and that Bissinger said that the mere possibility that Mercer would manufacture combat video games was unacceptable in light of Church values and thus he would not support a bid with Mercer regardless of the difference in price. (Op. 11-12). The board acknowledges that the undervaluation in the Gaming Option would likely compel stockholders to vote for the merger, even if they individually would prefer Mercer's higher bid. (Op. 12). "With respect to the Gaming Option, the Praise Video directors recognized that the acknowledged undervaluation reflected in the [Gaming Option] would likely encourage many Praise Video stockholders to vote in favor of the Merger, even if they individually would have preferred Mercer's higher cash bid under the circumstances."(Op. 12). "The directors [] viewed this likely effect positively, because it would favor and facilitate the consummation of the bid that achieved the balance previously approved by the majority of the directors." (Op. 12). "The directors openly and intentionally approved [New Hope's offer], [] because of their belief that ownership of Praise Video by New Hope would be more faithful to the religious principles embodied in Praise Video's express corporate mission." (Op. 1).

The Court of Chancery granted Plaintiff Appellee's motion for a preliminary injunction, and this appeal follows. (Op. 16).

ARGUMENT

I. THE PRELIMINARY INJUNCTION SHOULD BE UPHELD, AS PRAISE HAS FAILED TO FULFILL THE BALANCING REQUIREMENT MANDATED IN THE PBC STATUTE, AND, AS A FOR PROFIT CORPORATION, PRAISE HAS NO INTEREST IN PROMOTING RELIGIOUS VALUES, AND EVEN IF IT DOES, IT CANNOT TAKE THIS INTEREST INTO ACCOUNT ONCE THE CORPORATION MERGES WITH ANOTHER ENTITY AND CEASES TO EXIST.

A. Question Presented

Whether the board failed to perform the balancing test required by the PBC statute, and whether a for profit corporation has a corporate interest in promoting religious values, and, if so, whether this interest an appropriate concern to be taken into account when the corporation ceases to exist.

B. Scope of Review

This Court subjects the legal conclusions of the Court of Chancery regarding preliminary injunctions to a *de novo review. Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 394 (Del. 1996).

C. Merits of the Argument

1. This Court should uphold the preliminary injunction because the directors have made religion the dispositive factor when voting for this merger, instead of engaging in the balancing requirement as articulated in the PBC statute.

This Court should uphold the preliminary injunction on the grounds that the board failed to take into account the balancing test required by the PBC statute. In 2013, the Delaware legislature created the PBC Statute. Del. Code Ann. tit. 8, § 362. This defines a PBC as a "for-profit corporation…that is intended to produce a public benefit [] and to operate in a responsible and sustainable manner." Del. Code Ann. tit. 8, § 362. A PBC gives the board the authority to take the public benefit specified within its charter into consideration. Del.

Code Ann. tit. 8, § 362. But there is a difference between taking a public benefit into consideration, and making it the dispositive issue. The statute provides that "a [PBC] 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 benefit [] identified in its certificate of incorporation." Del. Code Ann. tit. 8, § 362. The board failed to perform this balancing requirement.

i. This Court should view the board's alleged balance as suspect, as the record clearly shows that the board was biased against Mercer even before the board met to decide on a bid.

Appellees recognize that courts usually defer to the business judgment of a board of directors. *In re Walt Disney Co. Derivative Litig.,* 906 A.2d 27, 52 (Del. 2006). But that deference should not be followed when a corporation has clearly violated a legislative mandate. A PBC is a new, hybrid creature. It is not all about profit, and it is not all about benefit. In creating the PBC statute, the legislature created a balancing test, which shows that public benefit is not a dispositive factor. Del. Code Ann. tit. 8, § 362. Because this is a case of first impression in this jurisdiction, and because the board violated a legislative mandate, appellees urge this Court to apply a heightened level of scrutiny to the board's decision to accept the New Hope bid by looking at the adequacy of the alleged balance.

To be sure, the minutes of the December 9, 2013 meeting do reflect that in a 4-1 vote, the board approved the New Hope bid, and that the board claims that it balanced the required interests. (Op. 11). But a self-serving statement that something is balanced does not make it so. At least one of the directors, Bissinger, did not go into the December meeting with an open mind, and his comments at the June 24, 2013 and December 9, 2013 meetings prove it. (Op. 7, 11-12). At the June 24, 2013 meeting, right after learning of Mercer's possible offer for Praise, the entire board, Bissinger included, was pleased. (Op. 7). The board was also grateful that Mercer's corporate identity appeared to support Christian precepts. (Op. 7). But Bissinger and Metcalf changed course over the mere possibility that Mercer may produce combat oriented games. (Op. 7). The record shows that Bissinger and Metcalf were "particularly outspoken" about military games, asserting that such games went against church doctrine preventing violence. (Op. 7). The two harbored these feelings and brought them to the December 9, 2013 meeting, where Bissinger, flanked by Metcalf, renewed his "deep concern" about the possibility that Praise would expand into combat games after Mercer acquired it. (Op. 11). Bissinger also stated that "the possibility that Mercer would expand Praise's gaming operations into the combat simulation market space would, even with a generally Christian themed orientation, be unacceptable in light of Church doctrine, and that he could not support a merger with Mercer regardless of the difference between the Mercer and New Hope bid prices." (Op. 11-12). From this, it is clear that Bissinger did not have an open mind at this meeting.

Appellants may argue that even if Bissinger had abstained or voted in favor of Mercer, New Hope still would have won 3-1, or 3-2, respectively. But that is not the case. First of all, with 22% of the outstanding stock, Bissinger is the corporation's largest stockholder, and he has been the CEO since the very beginning. (Op. 4). This could have made other directors feel pressured to go along with him. At the very least, a fact-finder should have the chance to examine this before the preliminary injunction is lifted. And although Bissinger was the only one on record saying he could not accept Mercer regardless of the price difference, Metcalf also showed signs that he would not be able to vote for Mercer. (Op. 11). Thus, Metcalf's vote should also be subject to judicial scrutiny. (Op. 7). And even if no other board member was persuaded by Bissinger, Bissinger and Metcalf together made up a sufficient amount of votes such that if they had come down in favor of Mercer, then Mercer would have won 3-2.

ii. An analysis shows that, had the board actually done the balancing test, Mercer would have won the bid.

A proper balance of the facts of this case indicates that Mercer's bid should have won. The three factors to be balanced are "…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." Del. Code Ann. tit. 8, § 362. Since appellant's feelings for its stated interest seems to be its strongest issue with Mercer, this will be examined first.

Any concern that the board has about the religious nature of Mercer is frivolous. Mercer has done nothing to violate church doctrine. In fact, the board was initially happy that a bidder with Mercer's Christian beliefs was interested in acquiring Praise. (Op. 7).

The board is likely to argue that it became uneasy when Stoltzfus indicated that "considerable market growth might be anticipated in the area of combat-oriented video games." (Op. 7). Even if this possibility were to weigh in against the public benefit, it should not be dispositive of the public benefit prong, let alone the entire balancing test. The board also expressed "misgivings" about the fact that Mercer is a wholly owned subsidiary of a secular multinational conglomerate. (Op. 11). This status made the board uneasy about the secular influence that the controlling conglomerate could have on Mercer. (Op. 11). But this concern would appear far more sincere if New Hope could show that it could not be influenced by a secular force. (Op. 6). It is undisputed that New Hope's bid specified that director Pennock would be CEO right after the acquisition of Praise, and that while he remained CEO, he would run the corporation according to church principals. (Op. 10). It is also undisputed that Pennock owns 20% of New Hope, and that Miller Price, a partnership, owns 80%. (Op. 6). While Miller is a member of the church, his partner Price, who has an equal vote in the partnership, is not. (Op. 6). What's more, the partnership agreement in Miller Price provides that in the event of a deadlock that is not resumed in 60 days, the two must either sell to one another, a third party, or liquidate the assets. (Op. 6, FN 10). Praise has not shown why it is any more likely that Mercer's parent corporation would decide to push secular views on the corporation than it is that Price might decide he wants to fire Pennock as CEO and hire someone who will take New Hope in a secular direction. Praise actually asked all bidders to include a provision that whoever acquired it would include the PBC clause in its charter. (Op. 9). But like Mercer, New Hope disregarded this request. (Op. 9).

Next, the board failed to even consider the pecuniary interests of the stockholders. The board voted for New Hope's bid of $41, even though Mercer bid $50. (Op. 2). On top of the lower price, New Hope's bid contained a crown jewel provision, which granted it the right to purchase the lucrative video game department of Praise for 40% below market value in the event that the stockholders did not vote for its bid. (Op. 2). Voting for this bid also left the board with no fiduciary out. *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 918 (Del. 2003). New Hope's bid might look more financially appealing to stockholders now that the board has agreed to the crown jewel provision, but that was not the case when the board voted. The board cannot claim to be considering the pecuniary interests of stockholders when it accepts an offer for less money, and a crown jewel provision with no fiduciary out.

The final prong of the balancing test is considering the best interests' of all involved. It is clear that Beard's and Mercer's interests were not considered, neither in their capacities as stockholders, nor as potential bidders. The fact that the board considered the best interests of itself, and a corporation partly owned by one director, is not enough to meet this prong. And though not an issue on appeal, New Hope's bid was unethical. When Mercer first expressed interest in Praise, it made it clear that what it really wanted was the video game department, and that it would be willing to go "north of $40." (Op. 7). Pennock took this information, and formed New Hope. (Op. 6). Then, knowing that New Hope could not outbid Mercer, it bid $41, and included this crown jewel provision.

(Op. 2). The majority of the board saw this provision as positive, as it would make most stockholders, even those who would have preferred Mercer’s higher offer of $50, vote in favor of New Hope. (Op. 12). The board cannot say it had the stockholders overall interest at heart when it approved a crown jewel provision it knew would force their hand. Furthermore, any argument that stockholders prefer to take Church values over a higher price cannot be proven.

Because the only contested element of a preliminary injunction is probability of success on the merits, and because there is a good chance that the Court of Chancery will find for the appellants, the preliminary injunction must be upheld.

2. The board has no interest in promoting religious values, and even if it does, it cannot take this interest into account once the corporation ceases to exist post-merger.

The board took liberties it did not have when it used a for profit corporation as a platform for promoting religious values. The 3rd Circuit has expressly held that “for-profit, secular corporations cannot engage in religious exercise….” *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 381 (3d Cir. 2013) *cert. granted,* 134 S. Ct. 678 (U.S. 2013). And even if it does have an interest in religious values under the PBC statute, it cannot take it into account once it ceases to exist post-merger.

i. Praise Video has no interest in promoting Religious Values.

No one is denying the rights of the directors, in their individual capacities as American citizens, to exercise their personal beliefs. But these rights do not extend to for profit, secular corporations. *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't* *of Health & Human Servs.*, 724 F.3d 377, 381 (3d Cir. 2013) *cert. granted,* 134 S. Ct. 678 (U.S. 2013) (holding that the religious rights of individuals do not extend to secular corporations). While the Supreme Court has granted certiorari, as of the date of this brief, it is still good law. In *Conestoga*, the corporation was not incorporated under a PBC statute. *See Conestoga*. But this does not change the result of the analysis. While the Supreme Court has held that other provisions of the First Amendment apply to corporations, it stopped short of saying that the Free Exercise clause applies. *Id.* at 384. Praise chose to incorporate to get certain corporate privileges, such as limited liability. Del. Code Ann. tit. 8, § 102. As a sole proprietor is not entitled to limited liability, a corporation should not be entitled to the free exercise clause.

To be sure, PBCs are indeed supposed to "produce a public benefit." Del. Code Ann. tit. 8, § 362. But the PBC statute does not give the board a blank check to impose its religious interests. If the legislature wanted to allow a PBC free rein in this kind of decision-making, it would not have created the balancing requirement. Del. Code Ann. tit. 8, § 362.

ii. Even if a corporation does have some type of religious interest, such an interest cannot be taken into consideration once the corporation is merged with a 3rd party.

Even if this Court finds that a PBC can have a religious interest, it cannot consider such interests once it merges with another entity. The Court of Chancery mentioned in its order that stockholders may be willing to accept less monetary value in a sale "in exchange for what they perceive as a greater contribution toward fulfillment of the company’s stated public benefit.” (Op. 14). But the facts of this case do not lend themselves to that conclusion. First of all, the PBC statute was only created last year, so while Praise is made up mostly of Church members, when these members bought their stock they had no expectation that their religious views would be taken into consideration. (Op. 14). And when the board urged stockholders to vote on the merger, it gave them several things to consider. The board told them that the reorganization merger “would likely take into consideration [Church] values as well as maximization of financial wealth.” (Op. 9). Some stockholders probably did want Church values to be considered in a sale, but it is just as likely that stockholders voted for it because the board promised “maximization of financial wealth.” (Op. 9).

Regardless, the board could not really have thought its stockholders would be so enthusiastic about getting less cash in furtherance of religion. This is evident since the board actually viewed it favorably that stockholders might be influenced by the crown jewel provision. (Op. 12). If the board believed stockholders would want to vote for New Hope, then it would have had no reason to think that the crown jewel provision coercing stockholders made any difference.

Therefore, because the board failed to balance the requisite factors, and because there is no corporate interest in promoting religious values, especially when a corporation is sold, the plaintiffs have a good chance of winning on the merits, and the preliminary injunction must be upheld.

II. THE BOARD'S USE OF A CROWN JEWEL LOCK-UP PROVISION COERCED STOCKHOLDERS TO VOTE A CERTAIN WAY, THUS TRIGGERING *BLASIUS'S* STRICT SCRUTINY STANDARD OF REVIEW REQUIRING A COMPELLING JUSTIFICATION, AND SINCE THE APPELLANT HAS NO COMPELLING JUSTIFICATION, THIS COURT SHOULD UPHOLD THE PRELIMINARY INJUNCTION.

A. Question Presented

Whether the board violated its duty of loyalty under *Blasius* when it used a crown jewel (lock-up) provision to compel stockholders to vote a certain way, and if so, whether it has a compelling justification for interfering with this vote.

B. Scope of Review

This Court subjects the legal conclusions of the Court of Chancery regarding preliminary injunctions to a *de novo review.* Lawson v. Meconi, 897 A.2d 740, 743 (Del.2006).

C. Merits of Argument

This case provides an opportunity for this Court to protect stockholders that are threatened by a board's coercive defensive measures. In order to uphold a preliminary injunction, one must show: "(1) a reasonable probability of success on the merits; (2) that absent injunctive relief, immediate and irreparable harm will result; and (3) that the harm to the plaintiff, if the injunction is denied, will exceed the harm to the defendant, if the injunction is issued." *In re Plains Exploration & Prod. Co. Stockholder Litig.*, Cons. C.A. No. 8090-VCN, slip op. at 9 (Del. Ch. 2013)(citation omitted). Since appellant has conceded the latter two elements, this Court should uphold the preliminary injunction since appellees can demonstrate a reasonable probability of success on the *Blasius* action. (Op. 13). Appellee's argument is twofold: 1. The board triggered Blasius's strict scrutiny when it intentionally interfered with the stockholder's vote by using a crown jewel provision to coerce stockholders into voting a certain way; and 2. The board lacks a compelling justification to interfere with this vote. Therefore, this Court should uphold the preliminary injunction.

1. The Blasius Standard of Review.

This case involves a buyout merger requiring a stockholder vote. *See* Del. Code Ann. tit. 8, § 251(c). Any interference with this vote triggers strict scrutiny, as defined in the Court of Chancery's formative ruling in *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988). Under *Blasius*, a board needs a "compelling justification" when it takes an action with the primary purpose of interfering with a stockholder vote. *Id.* at 661. The *Blasius* doctrine was clarified in *Stroud v. Grace*, 606 A.2d 75 (Del. 1992), and *Williams v. Geier*, 671 A.2d 1368 (Del. 1996). According to these cases, *Blasius's* strict scrutiny only applies "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.'" *Williams,* 671 A.2d at 1376 (quoting *Stroud II,* 606 A.2d at 92).

2. The Board admits that it voted for this crown jewel provision to coerce stockholders to vote for the New Hope bid, and thereby triggered *Blasius* strict scrutiny review.

"The stockholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests" and thus must be protected. *Blasius*, 564 A.2d at 659. Actions by directors, as agents of the stockholders, which interfere with the stockholder franchise "may not be left to the agent's business judgment." *Id.* at 660. To avoid *Blasius's* Review, the directors must show "that their actions...did not preclude the stockholders from exercising their right to vote or coerce them into voting a particular way." *Mercier v. Inter-Tel Inc.* 929 A.2d 786, 810-11 (Del. Ch. 2007).

When analyzing the Gaming Option "the directors recognized that the acknowledged undervaluation reflected in [the Gaming Option] would likely encourage many stockholders to vote in favor of the merger, even if they would have preferred Mercer's higher cash bid." (Op. 12). Since the Gaming Option prevents the stockholders from voting a certain way, it deprives stockholders of the opportunity to have an effective vote on the merger.

In a similar case, the lower court ruled that a claim that the board coerced stockholders to vote in a particular way fell under *Blasius's* strict scrutiny standard of review. In *Carmody v. Toll Bros., Inc.,* 723 A.2d 1180, 1184 (Del. Ch. 1998), "Vice Chancellor Jacobs examined whether a complaint attacking a 'dead hand' poison pill that could only be redeemed by continuing directors stated a claim under *Unocal* and/or *Blasius." Chesapeake Corp. v. Shore*, 771 A.2d 293, 322 (Del. Ch. 2000) (*citations omitted*). Jacobs stated "the dead-hand pill forced stockholders to vote for the incumbent directors in [an] election if they wished to elect a board with the authority to redeem the pill, [and thus] concluded that the pill was coercive." *Id.* Like the stockholders in *Carmody*, Praise's stockholders were coerced to vote for a proposal favored by incumbent directors. If Praise's stockholders did not vote for the New Hope bid, Praise would sell its most valuable asset at a 40% discount, thus, the stockholders had little choice but to accept the New Hope bid. *See* (Op. 1).

The board's crown jewel provision in and of itself may not be illegal, but based on the circumstances in this case, it should be struck down in accord with this Court's ruling in *MM Companies, Inc. v. Liquid Audio, Inc.,* 813 A.2d 1118 (Del. 2003). In *Liquid Audio*, this Court stated that "'inequitable action does not become permissible simply because it is legally possible.'" *Id.* at 1132. Then it considered whether a board could enact a bylaw that permitted the board to expand the size of its membership and whether the board could appoint successors to fulfill board vacancies. *Id.* This Court struck down those measures not because they were *per se* illegal, but because the "incumbent Board timed its utilization of these otherwise valid powers to expand the size and composition of the Liquid Audio board for the primary purpose of impeding and interfering with the efforts of the stockholders' power to effectively exercise their voting rights in a contested election for directors." *Id.* In accordance with *Liquid Audio*, Mercer does not argue that the use of a crown jewel provision should be illegal *per se*. It argues that the way this crown jewel was structured (based on the sale of a Praise division that accounted for 60% of its profit at a discount of 40%), along with the timing of when the crown jewel provision is triggered (following a no-vote by stockholders on the New Hope bid), made it particularly coercive. (Op. 1, 4). Since the Gaming Division was so important to Praise's future success, its stockholders were compelled to accept the New Hope bid to avoid triggering the crown jewel provision.

The only possible purpose the board could have had for the Gaming Option was to interfere with the stockholder vote. There is no conceivable advantage that the board would have received when it agreed to sell its most valuable asset at a 40% discount (in the event the merger did not go through) other than the coercive effect it would have on the stockholder vote. And not only did most of the directors admit that the Gaming Option would have a coercive effect on the stockholders, they admitted that they "viewed this effect positively, because it would favor and facilitate the consummation of the [New Hope] bid." (Op. 12).

The board's admission that it viewed the Gaming Option's coercive effect favorably is strong evidence that the board enacted the Gaming Option to interfere with the stockholders' vote. Appellant may argue that the primary purpose of the crown jewel provision was to ensure New Hope would actually bid in the first place (since the Gaming Option was a condition precedent to the bid). (Op. 10). But such a provision cannot be considered a mere condition upon which the bid is facilitated, because it made the merger itself a virtual certainty due to its coercive impact on the stockholder vote. Thereby, the board deprived stockholders of the right to freely vote on the merger.

Blasius strict scrutiny is not only triggered when the board interferes with a directorial election, but also when the board interferes with a stockholder vote that affects future corporate control. In *Mercier v. Inter-Tel Inc.* 929 A.2d 786 (Del. Ch. 2007), the Court of Chancery stated that there is a "need for close scrutiny of director action that could have the effect of influencing the outcome of corporate director elections or other stockholder votes having consequences for corporate control." *Id.* at 810. The stockholder vote on New Hope's bid determined who would control the corporation going forward, and thus according to *Mercier*, would be subject to *Blasius* review.

Appellant may argue that this Court should not follow *Blasius*, and instead follow *Unocal* according to this Court's ruling in *MM Companies, Inc. v. Liquid Audio*. In *Liquid Audio*, this court stated that the *Blasius* standard may be applied "independently or within the *Unocal* standard...where 'the primary purpose...is to interfere with or impede exercise of the stockholder franchise.'" *MM Companies, Inc. v. Liquid Audio, Inc.,* 813 A.2d at 1130 (Del. 2003). However, in *Mercier v. Inter-Tel Inc.*, the Court of Chancery clarified *Liquid Audio* saying that "the heightened scrutiny that *Unocal*'s fit test employs to assess defensive actions by directors, [is] to be ratcheted up to a form of strict scrutiny when the directors' actions affect[] the corporate franchise." *Mercier,* 929 A.2d at 809-10. According to *Mercier*, even if this Court reviews this case under *Unocal*, that *Unocal* review would be heightened to strict scrutiny, and thus appellant would have to overcome an extremely heavy burden to justify its actions.

Appellant may also argue that *Williams v. Geier*, 671 A.2d 1368 (Del. 1996) requires this Court to apply business judgment review. *Williams* held that *Blasius* review did not apply to a defensive measure enacted by the board because the measure was enacted after a stockholder vote. *Id.* at 1385. However, the vote here was not a freely consensual vote as in *Williams*. *Id*. Here, stockholders were heavily influenced by the defensive measure. Furthermore, the protections granted by *Blasius* would be illusory if the board could enact defensive measures that would rob stockholders of the right to vote freely.

It may be true that "the *Blasius* burden of demonstrating a 'compelling justification' is quite onerous" and should "therefore be applied rarely." *Williams v. Geier,* Del. Supr., 671 A.2d 1368, 1376 (1996). But the fact "that a test is 'onerous' is not a reason not to apply it if the circumstances warrant." Chesapeake Corp. v. Shore, 771 A.2d 293, 320 (Del. Ch. 2000). The circumstances in this case warrant this Court's use of *Blasius* to protect the stockholder vote.

3. The Board lacked a compelling justification to interfere with the stockholder vote.

Appellees argue that once *Blasius* is triggered, it is highly likely that Mercer will succeed on the merits because the appellant has an extremely "heavy burden of demonstrating a compelling justification for [its] action." *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988). Since the appellant has triggered *Blasius* and does not have the requisite compelling justification for interfering with the stockholder vote, the appellee has a high probability of success on the merits. Therefore, the preliminary injunction should be upheld. Any argument by appellant that it faced an inadequacy of price, that it sought to maintain its Christian corporate culture, or that the stockholders were incapable of performing the balancing test, are unlikely to prevail on the merits.

i. The coercive measures are not justified by price, as the Mercer bid was not only adequate, it was higher than the New Hope bid.

It is a well-established tenet of Delaware law that when the breakup of a company is inevitable, the board must "view its primary role as the promoter of bids, with price the dominant consideration." *MacAndrews & Forbes Holdings, Inc. v. Revlon, Inc.,* 501 A.2d 1239, 1250-51 (Del. Ch. 1985). The board has enacted the Gaming Option to facilitate a buyout bid with New Hope at $41 per share, instead of an offer by Mercer to acquire Praise for $50 per share. (Op. 2). Since there is clearly no inadequacy of price, the board's interference with the stockholder vote is highly suspect.

ii. Ensuring that the company's Christian culture is maintained is not a compelling justification under Delaware law, and even if this Court finds that it is, there is no evidence that this corporate culture is better maintained by New Hope as opposed to Mercer.

The board may attempt to justify its use of the Gaming Option to protect its Christian culture by facilitating a bid with New Hope. However, protecting corporate culture is not a compelling justification under Delaware law. In *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010), the Court of Chancery ruled that protecting a corporate culture that adds no value to stockholders is invalid under Delaware law. In *eBay,* the defendants tried to justify the use of certain defensive measures in order to prevent eBay from gaining a controlling stake in Craigslist, because this "would fundamentally alter craigslist's values, culture and business model, including departing from [Craigslist's] public-service mission in favor of increased monetization of Craigslist." *Id.* at 32. The Court ordered a rescission of the defensive measures because it found that "defendants failed to prove that craigslist possesses a[n]... advantageous culture that sufficiently promotes stockholder value." *Id.* at 33. In the present case the board justified its use of a crown jewel provision in part "because it would favor and facilitate the consummation of the [New Hope] bid." (Op. 12). The board wanted the New Hope buyout because it felt it would best protect Praise's Christian corporate culture. (Op. 1). "The directors openly and intentionally approved [the New Hope offer], they say, because of their belief that ownership of Praise Video by New Hope would be more faithful to the religious principles embodied in Praise Video's express corporate mission." (Op. 1).

The board presents no evidence that maintaining Praise's Christian corporate culture would lead to an increase in stockholder value. In fact, by enacting the crown jewel provision, the board sought to ensure that stockholders would vote for a bid of lower value. (Op. 2). In *eBay*, the Court ruled that protecting a corporate culture, even when that culture leads to a public benefit, is not grounds to uphold the provision. Applying *eBay* to the present case, the board lacked a compelling justification to perpetuate its Christian culture, even if that culture led to a public benefit.

Even if this Court finds that protecting Praise's corporate culture is a compelling justification, there is no evidence that its corporate culture is better maintained by New Hope as opposed to Mercer. (*See* Argument I, C, 1, ii above).

iii. The board cannot justify its use of the Gaming Option by arguing that the board, and the board alone, can best balance the three factors of the PBC statute.

The board in part justified its use of the coercive Gaming Option because the New Hope bid best "achieved the balance previously approved by a majority of directors." (Op. 12). But by enacting the Gaming Option the board deprived the stockholders of their right to balance concerns they had about how the company would be run in the future. In a sense, the board is arguing that the stockholders are too incompetent to balance concerns raised by the proposed merger, and that the board should make the decision for them. In *Chesapeake Corp. v. Shore*, 771 A.2d 293 (Del. Ch. 2000) the board tried to justify its use of defensive measures by arguing that the stockholders were incapable of determining who should comprise the target corporation's board. The Court ruled that "the defendants' belief that-because of their superior access to company information-they 'kn[ew] better than . . . the stockholders' . . .provides no legitimate justification at all" for their defensive actions. *Id.* at 345. Applying *Chesapeake* to the present case, the board's excuse that it can best balance the concerns raised by the PBC statute is not a legitimate justification for the Gaming Option.

CONCLUSION

For the foregoing reasons, appellee has a reasonable probability of success on the merits, and this Court should affirm the Court of Chancery's preliminary injunction.

Respectfully submitted,

/s/ Team F

Team F - Counsel for Appellees
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