

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
	:	
	:	
Defendants Below-	:	Court Below:
Appellants,	:	Court of Chancery of
	:	the State of Delaware in
	:	and for New Castle County
v.	:	
	:	
MERCER CHRISTIAN PUBLISHING CO.	:	Civil Action No. 8974-CD
and SUSAN BEARD,	:	
	:	
	:	
Plaintiffs Below-	:	
Appellees.	:	

APPELLANTS' OPENING BRIEF

Filed by Team G
Counsel for Defendants Below,
Appellants

Filed February 7, 2014

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NATURE OF PROCEEDINGS

This is an appeal from an interlocutory order of the Court of Chancery entered on January 15, 2014. This action was commenced on December 13, 2013 when Mercer Christian Publishing Co. and Susan Beard ("Mercer") brought action against Praise Video, Inc. ("Praise Video"); Jacob Bissinger, Francis Pennock, Mark van Zandt, Howard Metcalf, and Peter Hornberger (the "board"); New Hope Publishing Co., and Praise New Hope Corp. ("New Hope") collectively "Defendants", alleging a breach of fiduciary duty.

Mercer sought to enjoin a negotiated merger agreement between Praise Video and New Hope, claiming that the board failed to act in the best interest of its shareholders. By Memorandum Opinion on January 14, 2014 Chancellor Develin granted Mercer's motion for preliminary judgment and enjoined the consummation of the Praise Video-New Hope merger agreement. The preliminary injunction order followed on January 15, 2014. On January 22, 2014 Defendants filed their Notice of Appeal from the proceedings below. This is Defendants' Opening Brief.

SUMMARY OF THE ARGUMENT

1. The Praise Video board is subject to a new fiduciary standard created by 8 *Del. C.* § 365. A plain reading of the statute indicates that a board of a public benefit corporation that balances the pecuniary interests of shareholders, the public benefit of the corporation, and those materially affected by the corporation meets its fiduciary duty if its decision was informed, disinterested, and reasonable. After carefully considering both bids, the board determined that New Hope represented the best balance of the three

interests because it provided a fair value for the company and closely aligned with Praise Video's public benefit: the promotion of Mennonite Values. The Mercer bid, however, placed the longstanding devotion to the Mennonite Confession of Faith at risk.

2. Praise Video's decision to accept the New Hope bid is informed, disinterested and reasonable. The board made a reasonable decision based on expert opinion, Mercer's secular ownership, and an awareness of the dual bottom line of profitability and company policy reflected in the public benefit.
3. The Chancery Court erred in applying *Blasius* to the ratification of the New Hope gaming option. Acceptance of the gaming option was merely a secondary consequence of the board's ratification of a superior offer. See *Yucaipa Am. Alliane Fund II, L.P. v. Riggio*, 1 A.3d 310, 331 (Del Ch. 2010) aff'd, 15 A.3d 218 (Del. 2011).
4. The Chancery Court committed legal error by not applying the correct standard of review, *Unocal*. *Unocal* is applicable when directors institute a defensive measure against an adverse acquirer. The gaming option was granted because the Mercer offer threatened a core corporate policy.
5. The measures taken by Praise Video fulfill the two step inquiry under *Unocal*. First, it recognized the threat of Mercer's expansion into combat-type games, and second, the gaming option was proportional to the potential threat, as acceptance of the Mercer offer would most likely lead to the demise of a core corporate policy of Praise Video.

6. *Revlon* duties should not be applied to public benefit corporations because they are statutorily distinct from traditional for-profit corporations. Demanding strict adherence to *Revlon* would subject public benefit corporations to predatory takeovers, requiring them to ignore statutory duties.
7. Even if *Blasius* applied, protection of fundamental corporate policy in the context of public benefit corporations is a compelling justification. Refusing to recognize this compelling justification renders public benefit corporation status meaningless.

STATEMENT OF THE FACTS

Praise Video is a Delaware public benefit corporation formed to promote the values of the Mennonite Church. Op. 3. This policy is engrained within its certificate of incorporation, which explicitly codifies the public benefit as "the promotion of the values articulated in the Confession of Faith in a Mennonite Perspective." Op. 3. At least 90% of shareholders share this view. Op. 5.

A. A Positive Effect Since Day One

In the mid-1970s Jacob Bissinger ("Bissinger") founded "Old Praise Video" in order to provide wholesome alternatives to violent and sexually offensive entertainment. Op. 3. From a quaint two room, Pennsylvania office, the family owned Delaware corporation produced and distributed renditions of Bible stories as a substitute for unseemly material produced by secular media. Op. 3-4. This commitment to uplifting content continued for several decades as the corporation grew in popularity and expanded into other types of Christian themed digital entertainment. Op.4. One of the most successful products of

Old Praise Video, especially popular among Christians, is the Ark of Justice® video game, which was created in 2010. Op. 4. Its gaming division accounts for at least 60% of Praise Video's profit. Op. 4.

B. The Initial Steps to Finding a Potential Merger

In early 2013, Bissinger decided to retire and diversify his portfolio. Op. 6. To accomplish this, it became necessary to sell his shares of Old Praise Video. Op. 6. After informing Old Praise Video's board of directors of his intentions, the board took the sensible step of hiring a financial advisor, Norman Stoltzfus ("Stoltzfus"). Op. 6. The board advised Stoltzfus to locate potential buyers capable of purchasing Old Praise Video's entire stock. Op. 6.

By June 2014, Stoltzfus' search brought in a seemingly solid potential buyer. Op. 6. Mercer's website portrayed its mission as "spread[ing] inspiration by developing and distributing content that promotes biblical values and honors Jesus Christ." Op. 5. Mercer initially suggested a price for Old Praise Video's stock of somewhere "north of \$40." Op. 7. The interested acquirer thought that "modest capital infusion" and synergies between Mercer's own publications and gaming operations could lead to a substantial increase in Old Praise Video's customer base. Op. 7.

This offer initially sounded appealing; however, at the June 24, 2013 Praise Video board meeting, Bissinger's curiosity found an alarming issue in Mercer's offer. Op. 7. When Bissinger inquired into how Mercer would be able to obtain these enhanced revenues, Stoltzfus indicated that the best chance for substantial market growth would be in the area of combat-oriented video games. Op. 7. The expansion of

the gaming line into military-type games concerned many of the directors, especially Bissinger and Howard Metcalf ("Metcalf"), as this type of violence was strictly against Mennonite Church doctrine. Op. 7-8. Director Samuel Holbrook ("Holbrook") agreed that Church doctrine did not endorse the glorification of violence; however, Holbrook raised issue about the board interfering with the operation of the company post-merger. Op. 8. Because of the concerns the board was having, it asked Stoltzfus to continue his efforts to find a competent potential buyer, specifically one who could offer the best price and support the longstanding objectives of Old Praise Video. Op. 8. Holbrook's dissenting opinion led the board to ask legal counsel to examine the directors' legal obligations to the corporation. Op. 8.

C. The Birth of The Public Benefit Corporation

Old Praise Video's legal counsel came bearing news that ameliorated the concerns raised by the board. Counsel informed the board of Delaware's new public benefit corporate form. Op. 8. He relayed that this type of entity should allow greater flexibility to address financial and religious concerns in the sale of Old Praise Video. Op. 9. All but one of the directors supported the reorganization into a public benefit corporation. Op. 8.

The directors then submitted the proposal to reorganize the company to the shareholders, known as the "Reorganization Merger." Op. 9. The board informed the shareholders of Bissinger's imminent retirement and interest in diversifying his portfolio. Op. 9-10. It also explained that the Reorganization Merger would allow "greater legal flexibility in a sale of the company to take into consideration Mennonite values

as well as maximization of financial wealth.” Op. 9. The board included a copy of the new Delaware public benefit corporation statutes in the notice of the shareholder voting meeting. Op. 9. On September 30, 2013, the Reorganization Merger passed with at least 90% shareholder approval. Op. 9.

Plaintiffs Susan Beard (“Beard”) was a shareholder at the time of the Reorganization Merger. Op. 5. She voted against the merger, however did not exercise her right to appraise, and subsequently sell, her shares as permitted in 8 Del. C. § 363(b). Op. 5.

D. The Continuing Search Bears “Unexpected Fruit”

After the Reorganization Merger, the board was presented with an unanticipated offer. Op. 9 Director Francis Pennock (“Pennock”) offered to purchase Praise Video, promising to uphold the moral integrity of the company, for a purchase price equal to Mercer’s suggested price. Op. 9. The acquiring company, Praise New Hope, Inc., is a wholly owned subsidiary of New Hope, Inc. Op. 6.

New Hope is owned in part by Pennock, individually, and in part by the Miller Price partnership. Op. 6. Miller Price focuses its venture capital investments in companies that balance their financial gains with religious values. Op. 6. In addition, one of the partners, Isaac Miller, is a member of the Mennonite Church. Op. 6.

E. Final Bids are Submitted

In mid-November, the board and Stoltzfus instructed Mercer, New Hope and three other potential bidders to submit their best offers by December 5, 2013. Op. 9. Mercer and New Hope were the only companies to submit a bid. Op. 9. Both bids were fully financed, contained no-

shop commitments and termination fees of 3%. Op. 9-10. Mercer's offer was \$50 a share. Op. 9.

New Hope's offer came with two valuable measures. The first was a cash offer of \$41 per share. Op. 9. The second was a promise from Pennock that he would become CEO of Praise Video upon consummation of the merger and would operate Praise Video in a manner consistent with the values of the Mennonite Church. Op. 10. New Hope was well aware that it would not be able to outbid Mercer from a financial standpoint, thus it conditioned its bid on the grant of an option (the "Gaming Option") to acquire Praise Video's gaming division for \$18 million. Op. 10. If the Praise Video board were to accept the New Hope offer, the Gaming Option would become effective if its shareholders did not approve of the New Hope merger. Op. 10.

F. The Debate and Final Decision

The directors met on December 9, 2013 and debated between the offers at length for over seven hours. Op. 10. Pennock abstained from both the deliberation and the vote. Op. 9. Stoltzfus and the company's counsel carefully reviewed the bidding process, the impact of the Gaming Option, and the prospects for any further bids. Op. 10-11. Each of these parties and the Chancery Court concluded that there were no reasonable prospect of any superior bids coming within a reasonable time frame. Op. 11.

The debate at the December 9 meeting centered on the differences in the two offers and each acquirer's ability to uphold and promote the values of the Mennonite Church, as set out in Praise Video's certificate of incorporation. Op. 11. Concern arose with the fact that

Mercer is controlled by its parent company Mercer Media, a secular, multinational media conglomerate. Op. 11. Bissinger, in particular, noted that the risk of Mercer expanding the gaming line into military-type games could not be supported as this type of game is completely unacceptable in light of Church doctrine. Op. 11. The board understood that if it were to accept New Hope's offer, the gaming option could encourage shareholders to vote in favor of the deal notwithstanding their preference for the higher cash offer. Op. 12. Despite this possibility, the board recognized the value of Pennock's promise. Op. 12. The Plaintiffs and the Chancery Court acknowledge that the board was fully informed when it proceeded with a vote. Op. 10-11. The final determination was an approval of the New Hope offer with a vote of 4-1, once again with Pennock abstaining. Op. 12.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN GRANTING A PRELIMINARY INJUNCTION WHEN THE PRAISE VIDEO BOARD MET ITS FIDUCIARY DUTY PROSCRIBED IN SECTION 365.

A. Standard of Review

This court reviews the grant of a preliminary injunction for an abuse of discretion, "without deference to the embedded legal conclusions of the trial court." *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 394 (Del. 1996). Legal conclusions are subject to *de novo* review. *Id.*; *Lawson v. Meconi*, 897 A.2d 740, 743 (Del. 2006).

B. Merits of the Argument

A plain reading of 8 Del. C. § 365 indicates that directors of a public benefit corporation who apply the balancing test when making a decision meet their fiduciary duty if their decision is informed,

disinterested, and reasonable. The Praise Video board met this duty by weighing the proposed bids' effect on shareholders pecuniary interests, the public benefit of the company, and those materially affected by the corporation. After carefully considering both bids, the board determined that the New Hope bid represented the best balance. The decision to accept the New Hope bid was informed, disinterested and reasonable.

1. The board carefully balanced the financial interests of the shareholders, the promotion of Mennonite values, and the best interests of those materially affected by the corporation before accepting the New Hope bid.

A change in corporate control clearly falls within the category of a decision implicating the balance requirement of 8 *Del. C.* § 365(a), which applies when a board is "manag[ing] or direct[ing] the business and affairs of the public benefit corporation." A board is responsible for directing a sale or merger of a company as part of its managerial duties. 8 *Del. C.* § 251; see *Singer*, 367 A.2d 1349. Therefore, the directors of Praise Video are legally obligated to balance the interests of shareholders, the public benefit of the company, and the interests materially affected by Praise Video.

i. The New Hope bid ensures the public benefit of promotion of Mennonite values.

Public benefit is defined as "positive effects," including those of a religious nature, on "persons, entities, communities or interests." 8 *Del. C.* § 362(b). The public benefit of Praise Video is "the promotion of values in the Confession of Faith in a Mennonite Perspective," which includes a strong prohibition against the endorsement of violence and mandates abstention from military service.

Confession of Faith in a Mennonite Perspective, Article 22 cmt., available at <http://www.mennolink.org/doc/cof/art.22.html> (explaining that "[Mennonites] affirm that nonparticipation in warfare involves conscientious objection to military service and a nonresistant response to violence"). In light of this purpose, Praise Video exclusively offers media "alternative[s] to violent or sexually offensive entertainment generally offered by secular media." Op. 4. The gaming division of Praise Video has played an important role in the perpetuation of this purpose, promoting Mennonite values of peace with its popular non-violent Ark of Justice® video game.

New Hope's bid provides the board with explicit assurances that the gaming division would continue to be run "as it had been operated to date" in accordance with Mennonite values with Pennock as CEO. Op. 9. As a Mennonite, Pennock is personally vested in the perpetuation of the Mennonite faith, and is familiar with Mennonite values. The New Hope bid allows the board to maintain the integrity of its public purpose under the stewardship of a Mennonite CEO, who pledged to uphold the corporation's legacy. Furthermore, New Hope is wholly owned by a venture capital firm that focuses on companies like Praise Value, which "seek to balance financial gains with religious values." Op. 6. This focus indicates that New Hope's ultimate owners share the priorities of both the board and shareholders of Praise Video.

ii. Under Mercer's ownership, the future of the public benefit is uncertain.

Mercer's mission statement, although Christian, dilutes Praise Video's original public benefit: the promotion of the Mennonite faith.

Mercer's mission to "promote biblical values and honor Jesus Christ" is more general and expansive than the denominational specificity of Praise Value's policy. Op. 5. Unlike other Christian denominations, Mennonites espouse pacifism as a part of their doctrine. See *supra* p. 9-10. Without this tie to the Mennonite faith, combat oriented video games would still potentially be within the mission of a Christian company like Mercer. Courts traditionally defer to a board of directors when defining the scope of an organization's mission. See *In re Multiple Sclerosis Serv. Org. of N.Y., Inc.*, 496 N.E.2d 861, 865, 868 (N.Y. 1986) (non-profit directors allowed to interpret the scope of their mission). Even Holbrook, the dissenting board member, agreed that Church doctrine does not support the glorification of violence in videogames. Op. 8.

After evaluating how the New Hope bid would develop the public benefit, the board considered Mercer's likely effect on company policy. Undoubtedly, Mercer's intention to expand the customer base of Praise Video's gaming division would promote Mennonite values, but only if the gaming division continued to produce content consistent with the Mennonite faith. Stoltzfus indicated that Mercer's plan for the division could include expansion into violent video games—in direct contravention of Mennonite values. Mercer's status as a wholly owned subsidiary of secular, multinational conglomerate Mercer Media also strengthens the likelihood that the original public benefit will be forgone in favor of higher profits obtainable via violent games. Based on Stoltzfus' expert opinion and Mercer's secular ownership, the

board reasonably concluded the Mercer bid would diminish the public benefit of Praise Video.

iii. The continued promotion of Mennonite values is in the best interests of shareholders, the Mennonite Church, and consumers materially affected by Praise Video.

A public benefit is defined as a "positive effect" on stockholders "outside of their capacity as stockholders." 8 Del. C. § 362. Accordingly, the corporation's benefits should reach beyond the financial interests of shareholders to their personal interests. Almost all Praise Video stockholders are members of the Church and thus have a vested interest in the future of the Mennonite Church. This devotion to Mennonite values is exemplified by the 90% shareholder approval of the Reorganization Merger just last year. Shareholders were specifically informed prior to voting that the Reorganization Merger would allow directors greater flexibility in the sale of the company to incorporate Mennonite values, as well as maximization of financial wealth. Through their approval of the Reorganization Merger, shareholders exhibited commitment and support of the continued promotion of Mennonite values.

The Mennonite Church itself benefits from a corporation that exposes consumers to their way of life—which is a precept embodied in the Mennonite Confession of Faith. Confession of Faith, Article 10: The Church in Mission, available at <http://www.mennolink.org/doc/cof/art.10.html>. Many Mennonites endorse a lifestyle of pacifism, as directed in the Mennonite Confession of Faith, which aligns New Hope's commitment to avoid combat oriented video games. See *supra* p. 9-10.

Consumers will also benefit from the New Hope merger. The gaming community has shown support for the non-violent, video game Ark of Justice®. Violent video games dominate game sales. Entertainment Software Ass'n, *2012 Essential Facts About the Computer and Video Game Industry*, 9 (2012) available at http://www.theesa.com/facts/pdfs/esa_ef_2012.pdf (showing 7 of 10 best-selling video games of 2011 were combat oriented and 6 of the top 10 were rated "Mature"). Praise Video fills the void in a market dominated by these violent games by providing a wholesome and attractive alternative. Popular games like Ark of Justice® are therefore even more important for conscientious parents looking for positive entertainment. The integration of gaming and positive social precepts is a powerful tool that should not be abandoned in search of higher profits.

iv. The pecuniary interests of the shareholders are satisfied by the New Hope bid.

Public benefit corporations are "intended . . . to operate in a responsible and sustainable manner." 8 Del. C. § 362(a). Therefore sustainability, rather than profit maximization, is the intended goal of public benefit corporations. The New Hope bid presents a fair value for the company and is comparable to Mercer's initial "north of 40" figure, which was met with great enthusiasm by the board. Although the Mercer bid is greater, shareholders in a public benefit corporation place importance on considerations beyond their financial investment.

The New Hope bid reflects the 90% of socially conscious shareholders who approved the Reorganization Merger which allows Directors to focus on the company's dual bottom line. The Mercer bid, although greater, places the continuance of the company's public benefit at risk.

Ultimately, the New Hope bid maintains the integrity of the company's public benefit while offering a fair financial return to shareholders.

2. A plain reading of the statute indicates that directors who apply the balancing test when making a decision meet their fiduciary duty if their decision was informed, disinterested, and reasonable.

Plaintiffs and the Chancery Court acknowledge that the board was fully informed. Therefore, the board's actions must only be evaluated to see whether they were both disinterested and reasonable.

i. The Praise Video board made a reasonable decision in accordance with 8 Del. C. § 365.

The statute provides that a public benefit board meets its fiduciary duty if its decision is both disinterested and such that a "person of ordinary, sound judgment would approve." 8 Del. C. § 365(b). When evaluating board decisions, courts examine whether a board makes a "reasonable decision, not a perfect decision." *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 45 (Del. 1994).

The board's decision, based on logical inferences and a careful consideration of both bids, is reasonable. The board of Praise Video was instructed to "balance" the interests of stockholders, the public benefit, and those materially affected by the corporation. 8 Del. C. § 365. The word balance is defined by Webster's dictionary as "equipoise between contrasting, opposing, or interacting elements." "Balance", Merriam-Webster, available at <http://www.merriam-webster.com/dictionary/balance>. The balancing requirement thus places a limit on board power by preventing one interest from dominating the other considerations.

The current case is not one where the board unreasonably promoted the religious purpose to the exclusion of all else. Even if the Mercer bid best represents the financial interest of the shareholders, the difference between the two bids is not substantial enough to overcome New Hope's accommodation of the other two interests. New Hope secures a certain future for the gaming division, provides shareholders with a fair value for the company, and enables the continuation of the public benefits to those materially affected by the corporation.

ii. The Praise Video board was both disinterested and acted independently.

Courts typically determine if a board is "interested" based on the presence of financial incentives. *Cheff v. Mathes*, 199 A.2d 548, 554 (Del. 1964). Because the Mercer bid would result in higher financial returns, there are no financial incentives to accept New Hope's offer. Pennock, the sole board member who did have a financial stake in the merger, abstained from both the deliberation and the vote. In fact, by accepting the New Hope bid, Bissinger personally forwent a two million dollar windfall.¹

Boards are disinterested as long as they make a decision "based on the corporate merits of the subject before the board rather than extraneous considerations or influences." *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1049 (Del. 2004) (quoting *Aronson v. Lewis*, 473 A.2d 805, 816 (Del.1984)). The board's consideration of the religious benefit was clearly within the

¹Bissinger, as owner of 22% or 220,000 shares of Praise Value, stood to gain \$1.98 million more from the Mercer bid.

bounds of a merit based decision. Indeed, public benefit boards are statutorily mandated to consider their public benefit when making decisions. 8 *Del. C.* § 365. The balancing of the three factors was made in reasonable reliance upon a financial advisor and the facts available to the board.

Bissinger's statement about a hypothetical situation that failed to reflect reality should not transform the board's actions into an "interested" decision. Evaluating the legitimacy of a board's decision on this basis would render any statement made by a single director unduly determinative. Even if plaintiffs allege that Bissinger and Metcalf were overly zealous, the board still contained three other voting members who were disinterested. Even if it accurately reflects his personal views, Bissinger's statement alone is insufficient to taint the board's decision.

II. THE CHANCERY COURT ERRONEOUSLY APPLIED *BLASIUS* TO THE PRAISE VIDEO BOARD'S DECISION TO ACCEPT THE NEW HOPE OFFER, ACTING WITH THE PRIMARY PURPOSE TO SAFEGUARD CORE CORPORATE POLICIES.

A. Standard of Review

This court reviews the grant of a preliminary injunction for an abuse of discretion, "without deference to the embedded legal conclusions of the trial court." *Kaiser*, 681 A.2d at 394. Legal conclusions are subject to *de novo* review. *Id.*; *Lawson*, 897 A.2d at 743.

B. Merits of the Argument

The Chancery Court erroneously applied the *Blasius* standard of review to a defensive action of the board, noting the board's primary

purpose was to disenfranchise shareholder vote. To the contrary, Praise Video acted for the primary purpose of protecting its core corporate identity. Indeed, the Chancery Court acknowledges that the board acted in good faith to "promote the public benefit identified in Praise Video's certificate of incorporation." Op. 16. Incidental shareholder impediment, if any, is a secondary consequence, rather than a primary purpose for the board's actions. Praise Video's actions are comparable to other cases where this Court refused to apply the *Blasius* standard. For example, in *Yucaipa*, the corporate board adopted a poison pill in response to a proxy contest. 1 A.3d at 331. The Chancery Court refused to apply the *Blasius* standard, stating that the board's motivation was protecting the corporation from being influenced or controlled by a group without paying a fair price for that control. *Id.* Moreover, as in this case, "the effect on electoral rights was an *incident* to that end." *See Id.* (emphasis added). And while the context dealt with an unfair price, the logic still applies here. Praise Video was not convinced that \$50 per share was worth giving up control of its gaming division to a corporation that would fundamentally alter it.

Therefore, *Unocal* should be the applicable standard of review for the actions of the Praise Video board. Additionally, the enhanced *Revlon* factors are altogether inapplicable to public benefit corporations. Finally, even if *Blasius* is appropriate, the board clearly has a "compelling justification" for their actions.

1. The actions of the board should be analyzed under the *Unocal* standard of review.

Through the actions of the board, the two prong test of *Unocal* has been satisfied; therefore, the board is entitled to the business judgment rule. The *Unocal* standard of review is applied when the board initiates defensive actions in order to fend off an adverse acquirer. *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1152 (Del. 1989). This two prong test first evaluates whether there was a threat to corporate policy. *Unocal Corp v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985). The second prong assesses the proportionality of the defensive measure to the perceived threat. *Id.*

i. Combat simulations are a blatant violation of fundamental Mennonite Church doctrine.

With Praise Video's status as a public benefit corporation, one of its core corporate policies is to uphold the "values articulated in the Confession of Faith in a Mennonite Perspective." Op. 3. When making any business decision, the board must act in the best interests of the corporation and its shareholders. *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1287 (Del. 1989). Specifically, the board of a public benefit corporation must consider the public benefit sought to be achieved. 8 Del. C. § 362. The board of Praise Video has an affirmative duty to uphold the values of the Mennonite Church.

In order for a board of directors to initiate a defensive action against an adverse acquirer, there must be a reasonably perceived threat to corporate policy and effectiveness. *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1373 (Del. 1995). An adverse offer, or threat, can come in many different forms. See *Omnicare, Inc. v. NCS*

Healthcare, Inc., 818 A.2d 914, 935 (Del. 2003) (fear of losing an offer with no alternative); *Air Prods. & Chems., Inc. V. Airgas, Inc.*, 16 A.3d 48, 57 (Del. Ch. 2001) (tender offer at an inadequate price). It is a duty of the board to oppose any offer that is adverse to the corporation's interest. *Ivanhoe Partners v. Newmont Min. Corp.*, 535 A.2d 1334, 1337 (Del. 1987).

The existence of a perceived threat is evidenced by a decision of the board made in good faith and upon a reasonable investigation. *Unocal*, 493 A.2d at 955. A board can make a good faith decision by reasonably relying on an expert opinion. 8 Del. C. § 141(e); *Polk v. Good*, 507 A.2d 531, 537 (Del. 1986). Praise Video received a sound threat to one of its core corporate policies when its financial advisor, Stoltzfus, informed it that Mercer's greatest potential for enhancing revenues would be achieved by expanding into combat-oriented video games. This departure from Praise Video's corporate policy would be a patent violation of Church doctrine. Mennonites have a strong belief in peace among all men without the use of violence. See Confession of Faith in a Mennonite Perspective, Article 17, 22. Since Delaware statutory authority requires a board to protect the values listed as the company's public benefit, the risk of deserting those values is a cognizable threat.

ii. The defensive action was a proportional response to losing the integrity of the Praise Video gaming line.

The potential loss of the core value of the Praise Video's gaming line calls for a stark measure. A defensive action taken in regards to a reasonably perceived threat must not be coercive in nature and must be proportional to the perceivable threat. *Omnicare*, 818 A.2d at 935.

A board of directors has the "prerogative to determine that the market undervalues its stock and to protect its stockholders from offers that do not reflect the long term value of the corporation under its present management plan." *Unitrin*, 651 A.2d at 1376; *Time*, 571 A.2d at 1153.

Historically, "value" meant the highest cash price attainable. See *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986); But see *In re Toys "R" Us, Inc. S'holders Litig.*, 877 A.2d 975, 1000 (Del Ch. 2005). However, as the need for different corporate forms arises, this court has recognized that "our corporate law is not static. It must grow and develop in response to, indeed in anticipation of, evolving concepts and needs." *Unocal*, 493 A.2d at 957. With this in mind, it is evident that the characterization of "value" must conform to the needs of the public benefit corporation.

Value of a public benefit corporation goes beyond monetary considerations. This extra duty requires a board to consider not only the financial position of the corporation, but also any "positive effect ... on [one] or more categories of ... interests," including religious interests, which may be attached to the corporation. 8 Del. C. § 362; 8 Del. C. § 365.

The directors of Praise Video realized an undervaluation of their stock and took the only appropriate measure available. The board was given two options. First, it could sell the company for the highest price at the risk of losing all of its moral integrity, or second, the board could approve a merger with a company that promised to uphold the values which have been promoted for over three decades. The catch:

this offer was termed on a conditional defensive measure to be taken by the board. In essence, the board could lose its core corporate policies or take a defensive action which would still render an adequate price. A public benefit corporation must consider all relevant factors, including the social impact of its decisions. Therefore, the defensive measure prevented the loss of one of the key elements of a public benefit corporation

The New Hope deal represented the greatest overall value for Praise Video; therefore, because the offer was selected because of its merits, its acceptance is not coercive. See *Ivanhoe*, 533 A.2d at 605. Thus, the actions of the board were within the "range of reasonable responses" to the perceived threat. *Unocal*, 496 A.2d at 955.

iii. The board is entitled to the business judgment rule.

After the two prongs of *Unocal* have been satisfied, courts give deference to the directors' decision. *Macmillan*, 559 A.2d at 1287. Courts defer to the business judgment of the board, in acknowledgement of a board's expertise and to avoid hindering the business cycle. In *re J.P. Stevens & Co., Inc. Shareholders Litig.*, 542 A.2d 770, 783 (Del. Ch. 1988). Because the board of Praise Video reasonably perceived a threat to losing a core value of the public benefit corporation and proportionally responded by accepting the gaming option, it is entitled the business judgment rule.

2. Revlon "duties" are inapplicable to the sale of a public benefit corporation.

When a board enters the so called "Revlon-Land," its fiduciary duties "change[] from the preservation of [itself] as a corporate entity to the maximization of the company's value at a sale for the

stockholders' benefit." *Revlon*, 506 A.2d at 182; see *Time*, 571 A.2d at 1150. *Revlon* duties may be implicated in at least two separate circumstances. *Time*, 571 A.2d at 1150 (recognizing there could be other possible fact scenarios that may subject a board to *Revlon* duties); see *QVC*, 637 A.2d at 46-48 (same).

The first circumstance is "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." *Time*, 571 A.2d at 1150. For example, if a board solicits bids and makes public offers from various parties, it has initiated an active bidding process and will be subject to *Revlon*. *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1268-70 (Del. Super. Ct. 1988). The second circumstance where *Revlon* duties are implicated is when a board "abandons its long-term strategy and seeks an alternative transaction involving the breakup of the company." *Time*, 571 A.2d at 1150.

In *Revlon*, the board found itself stuck between complying with its fiduciary duties to multiple parties—its shareholders and its note holders. *Revlon*, 506 A.2d at 176. Importantly, these parties' "best interests" were essentially at odds; the board could not act in the best interest of both its shareholders and its note holders. See *id.* Despite contractual duties to its note holders, when a board becomes subject to *Revlon*, "there [must] be some rationally related benefit accruing to the stockholders." *Id.* at 176. Therefore, "concern for non-stockholder interests is inappropriate when an auction among active bidders is in progress" and the ultimate goal becomes maximization of the sale price. *Id.* at 182 (citation omitted).

This Court's *Revlon* jurisprudence has been consistently applied to traditional, for-profit corporations, but not public benefit corporations. See, e.g., *Revlon*, 506 A.2d 173; *Time*, 571 A.2d 1140; *QVC*, 637 A.2d 34; *Macmillan*, 559 A.2d 1261. While this may be largely due to the only recent adoption of Section 362 and 365, it also speaks to the unique classification afforded to public benefit corporations. Like the board in *Revlon*, Praise Video finds itself having to comply with two duties. See *Revlon*, 506 A.2d at 179. However, unlike *Revlon*, Praise Video is under a statutory duty to (1) balance shareholder pecuniary interests and (2) promote its public benefit, both of which implicate the interests of its shareholders. Moreover Praise Video must also look to "shareholders outside of their capacity as shareholders." 8 Del. C. § 362. This distinction from *Revlon* is key because Praise Video is not concerning itself with the interests of any third party. Rather, both duties are intended to maximize the value to one party—the shareholders.

Because of these dual obligations owed to shareholders by all public benefit corporations, this Court should exempt them from *Revlon* duties. *Revlon*'s requirement that boards seek the most profit for shareholders promotes the purpose of these traditional corporations. However, it does not promote the purpose of public benefit corporations, whose cultures are oriented towards a dual bottom line of profitability and their public benefit.

Requiring strict adherence to *Revlon*'s profit maximization requirement undermines public benefit corporations' ability to protect their public benefit by making them vulnerable to predatory takeovers.

Corporations looking to quickly increase their profitability could easily acquire a public benefit corporation and slash the often expensive socially conscious programs. Moreover, it also effectively requires public benefit corporations to ignore their statutory obligations and act as if they are a traditional corporations. This result is absurd and directly conflicts with not only the letter of Section 362 and 365, but the spirit and purpose.

3. Even if *Blasius* is applicable the board has a compelling justification for its actions.

It is clear that once *Blasius* is implicated, Delaware courts rarely find a for-profit board's actions sufficiently compelling. See, e.g., *Mercier v. Inter-Tel (Delaware), Inc.*, 929 A.2d 786, 810 (Del. Ch. 2007) (in reference to *Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022, 1089 (Del. Ch. 2004): "to my knowledge, only one prior decision, as an alternative holding in extraordinary circumstances, has ever found it satisfied").²

Even if Praise Video acted with the primary purpose of disenfranchising its shareholders, in the context of a public benefit corporation, protection of fundamental corporate culture is a compelling justification. The inherently Mennonite characteristic of Praise Video is manifested in many different aspects of the corporation itself. The board is comprised of Mennonites, most shareholders are Mennonites, and the corporation is classified under

² The *Mercier* court also found that directors acting to protect their shareholders' financial best interests by postponing a merger vote "to allow more time for deliberation" is a compelling purpose. *Mercier*, 929 A.2d at 788.

Delaware law as a "public benefit corporation." Perhaps most telling is that over 90% of its shareholders voted to become a public benefit corporation less than a year ago. That is, over 90% of its shareholders agreed that the mission should be not only to make a profit, but equally to promote Mennonite Values.

These distinctive characteristics present in all public benefit corporations set them apart from run of the mill for-profit corporations. And because these organizations are so distinctive and diverse, justifications that would be labeled as non-compelling for regular corporations should not necessarily be considered non-compelling for public benefit corporations. Boards such as that in Praise Video are in the unique position of having to consider not one, but two core goals—both equally significant. Indeed, the Delaware Legislature treats public benefits corporations differently, and so should this Court. Given not only the corporate culture of Praise Video, but the statutory classification and protection afforded to it, the authority to safeguard fundamental corporate purpose, culture, and policy should certainly qualify as a compelling justification.

CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, this Court should reverse the Court of Chancery below and deny the preliminary injunction against the Praise Video and New Hope merger.

Respectfully submitted,

/s/ Team G

Team G,
Counsel for Defendants-
Below, Appellants

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