IN THE

SUPREME COURT OF THE STATE OF DELAWARE

MERCER CHRISTIAN PUBLISHING CO. and :
SUSAN BEARD, :
Plaintiff, :
:
v. : No. 43, 2014
:
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. :

OPENING BRIEF OF APPELLEE, MERCER CHRISTIAN PUBLISHING CO. and SUSAN BEARD

On Appeal from the Order entered 15 January 2014 by the Honorable Sean Develin, Chancellor, in the Court of Chancery of the State of Delaware, docketed at C.A. No. 8974-CD

Team "H"
Attorneys for Appellee/Plaintiff Below
Mercer Christian Publishing Company and Susan Beard
7 February 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

NATURE OF PROCEEDINGS

The matter before this Court is an interlocutory appeal from the order of Chancellor Sean Develin granting a preliminary junction to plaintiffs Mercer Christian Publishing Company and Susan Beard. Said order was entered on 15 January 2014 in the Court of Chancery for the State of Delaware and enjoined a proposed merger between defendants Praise Video, Inc. and New Hope Publishing Company.

Plaintiffs commenced their action (C.A. No. 8974-CD) on 13 December 2013 following the announcement that a merger agreement had been achieved on 9 December 2013. Plaintiff's action sought a preliminary injunction against the consummation of this merger agreement between the board of Praise Video, and New Hope Publishing Company. After limited expedited discovery, the Court of Chancery, by Chancellor Sean Develin, found for plaintiffs and granted a preliminary injunction thereby halting any action by defendants to effectuate, enforce, or consummate any term or provision of this merger agreement.

Notice of defendant's appeal of the Court of Chancery's ruling was provided on 22 January 2014 following certification by the Court of Chancery and pursuant to Delaware Supreme Court Rule 42. Defendant's petition for interlocutory appeal was accepted by this Court on 23 January 2014.

SUMMARY OF THE ARGUMENT

This Court should affirm the Court of Chancery's grant of injunctive relief preventing the merger of Praise Video with New Hope Publishing Company. The Court of Chancery properly applied Delaware's long-settled legal standard for preliminary injunctions in finding that plaintiffs exhibited a sufficient likelihood of success on the merits of their case such that injunctive relief was appropriate. Importantly, defendants in the proceedings below conceded that should success on the merits be likely, injunctive relief would be appropriate, and thus the Court of Chancery's analysis was limited to that inquiry alone. The merits of plaintiff's argument are based on breach of fiduciary duty, and the coercive nature of any shareholder vote stemming from the merger agreement.

First, defendant directors breached their fiduciary duties to plaintiff shareholders by failing to maximize share value in a merger that represented a "final-stage" transaction for shareholders as they must under *Revlon*. Defendant board was faced with two competing bids for Praise Video, plaintiff Mercer's bid of $50 per share, and defendant New Hope's bid of $41 per share. In violation of their fiduciary duties to shareholders, defendant board accepted the lesser bid purely in consideration of the fact that they believed New Hope's plans for the future of Praise Video to be more in line with the religious values for which Praise Video advocated as a public benefit corporation. Furthermore, as directors of a public benefit corporation, defendant board had a statutory responsibility to balance the pecuniary interests of shareholders with the interests of those materially affected by the Praise Video's business, and the public benefit articulated in Praise Video's articles of incorporation. Defendant directors took Praise Video's articulated public benefit as dispositive in making their decision amongst the two competing bids, in violation of DGCL 365(a) and their fiduciary duties to shareholders.

Secondly, and perhaps most disturbingly, by offering defendant New Hope a "crown jewel" in the form of the "gaming option" under the terms of the merger agreement, defendant directors deprived Praise shareholders of any opportunity to exercise their statutory right to a free and informed vote on the merger. Essentially, the exclusive "gaming option" offered by the Praise directors—if permitted—would coerce Praise shareholders to vote for New Hope and its financially lesser bid.

STATEMENT OF FACTS

Praise Video was formed in September 2013 as a Delaware Public Benefit Corporation. (Op. 3). Praise Video's certificate of incorporation identifies its public benefit as "the promotion of the values articulated in the Confession of Faith in a Mennonite Perspective" (the "Confession of Faith"). (Op. 3). Praise Video's product lines originally consisted of renditions of Bible stories, but have recently diversified into Christian-themed video games. (Op. at 4). Praise Video's earnings have averaged around $4 million ($4 per share). (Op. at 4). At least 60% of Praise Video's profit is attributable to Praise Video's gaming division. (Op. at 4).

Jacob Bissinger has served as Praise Video's CEO and director from the company's inception. (Op. 4). Bissinger owns approximately 22% of Praise Video's outstanding shares of common stock. Praise Video's directors other than Bissinger own in the aggregate approximately 4% of Praise Video's common stock. (Op. 4). All Praise Video's directors are members of the Mennonite Church USA ("the Church"). (Op. 4). Almost all of the other stockholders are either members of the Church or are related to Church members. (Op. 4).

Mercer is a 2% shareholder in Praise Video. Mercer is an indirect wholly-owned subsidiary of Mercer media, Inc. ("Mercer Media"), a multinational media conglomerate. Mercer was acquired by Mercer Media in 2009. (Op. 5). Mercer produces Bibles, inspirational books, church school curriculum, and audio and digital Christian faith-based content. (Op. 5). Mercer maintains an independent identity from Mercer Media: its stated mission is "spread inspiration by developing and distributing content that promotes biblical values and honors Jesus Christ." (Op. 5).

New Hope, is a newly organized Delaware corporation that was formed for the purpose of acquiring Praise Video. (Op. 6). Francis Pennock owns approximately 20% of New Hope's shares and plans to serve as Praise Video's CEO following completion of the current sale at issue (the "Merger"). At all relevant times Pennock has also served as a Praise Video director. (Op. 5). Miller Price L.P. ("Miller Price") owns 80% of New Hope's shares.

Miller Price is a Delaware limited partnership that engages in venture capital investments focusing on portfolio companies that balance financial gains with religious values. (Op. 6). Isaac Miller, one of Miller Price's two principals, is a member of the Church. (Op. 6). Stephen Price, Miller Price's other principal, is not a member of the Church. (Op. 6). Miller Price's limited partnership agreement requires that in the event of an unresolved deadlock between the two principals, the principals are required to either buy out the other principal's interest or pursue liquidation proceedings. (Op. 6).

In early 2013, Bissinger decided to retire as Praise Video CEO. (Op. 6). As a result of his decision to retire, Bissinger began to consider selling his Praise Video shares in March 2013. (Op. 6). Bissinger informed the board of directors of his decision, who then retrained Norman Stoltzfus as a financial advisor. (Op. 6). By early June 2013, Stoltzfus identified Mercer as a potential bidder to acquire Praise Video for stock or cash. (Op. 7). Mercer specifically expressed its interest in acquiring and expanding Praise Video's gaming division. (Op. 7).

However, the board of directors reached considerable debate concerning Mercer's potential acquisition after its June 24, 2013 meeting. (Op. 7-8). Directors Bissinger and Metcalf were concerned about Mercer's potential expansion into combat-oriented video games (Op. 7). Specifically, Bissinger and Metcalf were concerned that such video games violated express Church doctrine, to "witness against all forms of violence, including war among nations, hostility among races and classes, abuse of children and women, violence between men and women, abortion and capital punishment." (Op. 7-8). Director Holbrook, however, maintained that the board of directors were obligated to achieve the highest sale price for its shareholders, and suggested that it was inappropriate to dictate how Praise Video should be operated post-sale. (Op. 8).

As a result of this debate, the board of directors presented Praise Video shareholders with a reorganization merger (the "Reorganization Merger") under Delaware's newly enacted public benefit laws. (Op. 8). The board of directors informed Praise Video shareholders that it was exploring a possible sale of the company, and that the Reorganization Merger would likely provide the directors legal flexibility in a sale of the company consideration of both Mennonite values and a maximization of financial wealth. (Op 9). The Reorganization Merger was approved and became effective on September 30, 2013. (Op. 9).

During this time, director Pennock and Miller Price formed New Hope and expressed an interest and submitting a bid to acquire Praise Video. By mid-November 2013, the board of directors (with Pennock abstaining) directed Mercer, New Hope, and three other potential bidders to submit their bids by December 5, 2013. (Op. 9). Only Mercer and New Hope submitted their bids of $50 per share and $41 per share, respectively. (Op. 9). Despite Praise Video's requests, neither bidder agreed to include a post-merger certificate of incorporation that would continue the public benefit provision in Praise Video's existing charter. (Op. 9).

New Hope's bid was granted an exclusive concession: the grant of an Option ("the Gaming Option") to acquire Praise Video's gaming division for $18 million, payable in 5-year installment notes, if New Hope's merger bid failed to gain the necessary Praise Video shareholder approval. (Op. 10.). Based on the opinions of Praise Video directors, expert witnesses, the Gaming Option's exercise price is approximately $12 million (or 40%) below its actual $30 million value. (Op. 10).

In reviewing New Hope and Mercer's bids, the directors again considered both bidders' ability to promote Praise Video's public benefit. (Op. 10-11). Directors Bissinger and Metcalf again expressed their concern that Mercer, after acquiring Praise Video, would expand its operations into combat simulation video games. (Op. 11). At the December 9, 2013 board meeting, the Praise Video board of directors voted 4-1 to approve the New Hope bid (with Holbrook dissenting and Pennock abstaining) on the grounds that it balanced shareholders' pecuniary interests with the company's public benefit. (Op. 11). The board of directors recognized the acknowledged undervaluation of the Gaming Option, but held that it would positively affect the Merger by facilitating a bid that achieved the a proper balancing of interests as previously discussed. (Op. 12).

<u>ARGUMENT</u>

The Chancery Court Properly Granted Injunctive Relief to Plaintiffs as Plaintiffs Successfully Demonstrated a Likelihood That Defendants Acted in Violation of Fiduciary Duty

A. Question Presented

Under *Revlon* and Delaware General Corporate Law 362, did defendant directors violate their fiduciary duties to corporate shareholders when they accepted an underpriced bid for the acquisition of Praise Video for the sake of Praise Video's public benefit post-merger?

B. Scope and Standard of Review

"This Court's standard and scope of review as to facts on appeal from a preliminary injunction is whether, after independently reviewing the entire record, we can conclude that the findings of the Court of Chancery are sufficiently supported by the record and are the product of an orderly and logical deductive process." *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 37 n. 3 (Del. 1983) (citing *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1342–41 (Del. 1987). Legal conclusions made by the Court of Chancery are subject to *de novo* review. Lawson v. Meconi, 897 A.2d 740, 743 (Del. 2006).

C. Merits of the Argument

The Chancery Court correctly applied the well-settled legal standard for a preliminary injunction. That standard demands that the moving party establish (1) a reasonable probability of success on the merits of the case; (2) irreparable harm to the moving party should injunctive relief not be granted; and (3) that a balancing of any hardships stemming from the injunction would favor the moving party. *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1279

(Del. 1989) (citing *Gimbel v. Signal Companies*, 316 A.2d 599, 603 (Del. Ch. 1974) aff'd, 316 A.2d 619 (Del. 1974)). While injunctive relief is considered an "extraordinary remedy", an application for such relief is nevertheless "addressed to the sound discretion of the court, to be guided according to the circumstances of the particular case." *Gimbel v. Signal Companies*, 316 A.2d 599, 603 (Del. Ch. 1974) *aff'd*, 316 A.2d 619 (Del. 1974). Here, because defendants conceded that if a "reasonable probability of success on the merits" could be demonstrated, then a preliminary injunction would be appropriate, the issue before this Court is restricted to that initial prong of the preliminary injunction standard. (Op. 11).

Defendant directors violated their fiduciary duties to plaintiff shareholders by improperly considering the future operations of Praise Video when a sale of the company was imminent and by failing to base their corporate decisions on the balancing of interests required by statute of public benefit corporations. DGCL 362(b); 365(a). Under Delaware law, a sale of control of a corporation confers upon directors a duty "to secure the transaction offering the best value reasonably available for the stockholder…" *QVC*, 637 A2d at 34 (citing *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986)). The Court of Chancery has explained this rule to mean that in the context of a sale of a company—where there is "no tomorrow" for shareholders—a board has an obligation to make a make a decision that is informed, in good faith, and which proceeds "reasonably". *Equity-Linked Investors, L.P. v. Adams*, 705 A.2d 1040, 1055 (Del. Ch. 1997).

Delaware's recent enactment of DGCL section 8 (public benefit corporations) calls into question the effect of this longstanding duty of directors—in selling a company—to secure bids granting shareholders the highest price per share possible. (Op. 3). Delaware General Corporate Law Sections 362 and 365 permit the creation of for-profit entities which may operate to further "public benefits". Del. Code Ann. tit. 8, § 362 (West). However, this statutorily granted designation confers upon directors a duty to manage the company in such a way that balances stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in the corporation's certificate. Del. Code Ann. tit. 8, § 365 (West).

i. Defendant Directors Improperly Considered the Religious Orientation of the Company Post-Merger in Violation of Duties Imposed by Revlon.

When a board of directors enters into a merger that will result in a change of control in the corporation, *Revlon* enhanced-scrutiny is the appropriate standard of review. *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 928 (Del. 2003) (citing *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del.1986)). Further, *Revlon* and its progeny impose a duty upon directors in specific corporate contexts to act reasonably to maximize "the current value of the corporation's equity." *Equity-Linked Investors*, 705 A.2d at 1055.

The Court of Chancery has articulated "the gist" of the *Revlon* state as demanding that boards act reasonably to maximize current, as opposed to future, value to shareholders. *Id.* *Adams* involved a conflict between the interests of holders of a preferred stock with a liquidation preference with that of common stockholders. *Id.* at 1041. In that case, the corporation in question, Genta, Inc. was on the verge of insolvency—a concern which was exacerbated by the liquidation preference held by preferred stockholders. *Id.* In an effort to continue the firm's operations on the chance that promising new technological developments would render the company profitable again, the board actively began seeking out fresh capital. *Id.* The lawsuit began where Genta attempted to borrow on a secured basis some $3,000,000 from lender 'Aries' in exchange for notes, and warrants exercisable into half of Genta's outstanding stock, as well as a contractual right to designate a majority of the Genta board. *Id.* at 1042, 1053. Seeking to enjoin this transaction, plaintiff preferred stock shareholders brought suit on the theory that the method of capital infusion chosen by the board amounted to a change in corporate control of Genta, thus imposing *Revlon* duties on said board. Finding that this transaction triggered *Revlon* duties, the Court of Chancery explained that:

> "[I]f we assume that Genta's board was operating under the unusual gravitational pulls of planet Revlon, we must acknowledge that the board is supposed in such "sale of control" circumstances, to have the single aim of maximizing the present value of the firm's equity. That requirement is very clear when, for example, one bidder, offers an all cash deal and another offers all cash as well, but less money."

Id. at 1058.

Finding that the transaction sought by the Genta board was distinguishable from a "no tomorrow", cash-out type merger (of the sort in the case at bar), the Court refused to impose on the Genta board the duty to seek higher *present value* for the sake of "longer term value". *Id.* at 1058-59.

The Supreme Court of Delaware has also noted that the relevant timeframe for a board's analysis is "immediate value maximization for all shareholders." *McMullin v. Beran*, 765 A.2d 910 (Del. 2000). In *McMullin*, this Court had the opportunity, again, to examine the fiduciary duties of a board of directors in the context of a proposed sale of a corporation to a third party. *Id.* at 918-19. While *McMullin* did not involve a "change of control" of a corporation, *Revlon* duties were implicated because the board negotiated an entire sale of Chemical to Lyondell. *Id.* at 920. Explaining the fiduciary duties of a board of directors in the context of a sale or cash-out merger, this Court made clear that because such a decision represents a "final-stage" transaction for shareholders, the relevant timeframe for the boards analysis is "*immediate value maximization for all shareholders*." *Id.* at 918.

Furthermore, the concerns of a final-stage transaction such as a complete sale are not lost on a for-profit public benefit corporation. The unique context of such a merger is a fundamental underlying reason for *Revlon*'s enhanced scrutiny and fiduciary duty:

> [I]n a situation where parties expect to have repeated transactions, the recognition that a party who cheats in one transaction will be penalized by the other party in subsequent transactions reduces the incentive to cheat. However, when a transaction is the last (or only) in a series—that is, the final period—the incentive to cheat reappears because, by definition, the penalty for doing so has disappeared.

Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442, 458 (Del. Ch. 2011) (quoting Ronald J. Gilson & Bernard S. Black, *The Law and Finance of Corporate Acquisitions* 720 (2d ed.1995)). Thus, the general principles of *Revlon* and its progeny are said to govern every case in which a "fundamental change of control occurs or is contemplated." *Barkan v. Amsted Industries, Inc.* 567 A.2d 1279, 1286 (1989). As Justice Moore put it, such transactions shift the role of boards from "defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company." *Revlon*, 506 A.2d at 182.

As Justice Moore articulated in *Revlon*, a board may discharge its responsibilities by taking into account various constituencies aside from shareholders, so long as there are related benefits to stockholders, but where an active bidding contest is taking place, such third-party concerns are inappropriate as the object is no longer to protect or maintain the corporation, but to sell to the highest bidder. *Revlon*, 506 A.2d at 182. This is to say that *Revlon*'s duties are imposed when a corporation "initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear break-up of the company." *Paramount Communications, Inc. v. Time Inc.,* 571 A.2d 1140, 1150 (Del. 1990). Furthermore, the duties imposed by *Revlon* apply when a board seeks to approve a transaction that results in a sale or change of control in the company. *QVC*, 637 A.2d at 44.

Praise Video's directors, beginning with defendant Bissinger, began to explore the possibility of liquidating their investment in Praise Video in early 2013. From the beginning, plaintiff Mercer's offer was appealing to the Praise board. (Op. 7). However, due to defendant Bissinger and Metcalf's apprehension as to Mercer's plans for expansion of Praise Video's gaming business post-merger, negotiations stalled. *Id.* Nevertheless, by early June of 2013, defendant directors had initiated the process of shopping Praise Video—even employing the services of Richard Stoltzfus in doing so. From that point forward, Praise directors took on the enhanced fiduciary duties dictated by *Revlon* and subsequent cases. In discharging those duties, defendant directors failed, regardless of Praise Video's status as a public benefit corporation. It was the very fear of *Revlon* fiduciary duties that prompted defendant director's to initiate the "reorganization merger". (Op 9). In fact, Praise Video was a public benefit corporation from September 30, 2013 until the final merger approval on December 9, 2013—less than three months. (Op 9, 11).

Notwithstanding the motives behind Praise Video's reorganization, defendant directors cannot escape their duties to shareholders in this context. The sale of Praise Video is a final-stage transaction. Praise Video will cease to exist as such following this merger and its shareholders will essentially be trading their voting rights for cash. It would be absurd to suggest that Praise Video's reorganization pursuant to DGCL 362 would immunize its board of directors from their duties in this vital, highly-scrutinized stage in the life of a corporation. While the courts have yet to comment on the interplay between *Revlon* and the public-benefit corporation, to render *Revlon* inapplicable in this factual scenario would essentially render Praise Video a non-profit entity. Finding *Revlon* inapplicable would strip from *for-profit* public-benefit corporations the protections afforded by a rule that preserves shareholder primacy. Finally, the consideration by Praise Directors of the long-term direction of the company after it ceases to exist flies in the face of the relevant timeline articulated by cases after *Revlon*. Where the Board of Directors of Praise Video based a considerable portion of their merger approval on the *future* prospects of a corporate interest *unrelated* to the maximization of *present* share-value, an injunction is appropriate as it is in violation of what is indisputably the corporate law of Delaware.

ii. Defendant Directors Further Breached Their Fiduciary Duty by Failing to Balance the Interests Required by Statute.

Praise Video is a "Public-Benefit Corporation" properly incorporated pursuant to the requirements of Section 362, Del. Code Ann. tit. 8, § 362 (West). Delaware General Corporation Law requires that such corporations "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 or public benefits identified in its certificate of incorporation." *Id.*

The impact of the public benefit corporation on Delaware Corporate Law is a matter of first impression. (Op. 1). Regardless of the impact of Section 362 on the larger body of corporate law, the record here makes clear that defendant directors did not consider stockholder pecuniary interests, or the interests of those materially affected by the corporation's conduct in approving the merger with New Hope. In fact, the record suggests that the primary reason for which the Praise Board chose to reincorporate as a public benefit corporation was to circumvent the restrictions imposed on Boards in times of sale or merger. (Op. 9). In other words, the record before this Court is devoid of any evidence to suggest that defendant directors considered any except then-Praise Video's public benefit purpose. In the entire course of merger discussions, shareholder pecuniary interests were discussed once, and this took place out of director Holbrook's concerns *before* the company reorganized as a public-benefit corporation. (Op. 8). Perhaps the most notable evidence presented before the Court of Chancery was the minutes of the board meeting of 9 December 2013. (Op. 10-11). Chancellor Develin concluded below that the meeting had one "central point of controversy"—the ability of the respective bidders to promote Praise Video's present public benefit. *Id.* While the board stated in those minutes that a balancing had taken place, it is clear that director Bissinger, then-CEO of Praise Video, would *not* support a merger with plaintiff Mercer solely because he believed their goals for the company to be out of line with Praise Video's public benefit. (Op. 11). Nowhere in the record is there mention that the board even considered how $9-less per share would impact the 250 shareholders of Praise Video. Thus, regardless of whether it was appropriate *at all* for defendant directors to consider the potential management of Praise Video post-merger, those directors cannot hide behind the statute to avoid their fiduciary duties to shareholders and subsequently fail to balance the concerns mandated by that very statute.

II. The Gaming Option Effectively Deprived Praise Video Shareholders of Their Statutory Right to Vote on the Transaction in Violation of Blasius

A. Question Presented

Whether the Praise board of directors, in exclusively offering the undervalued Gaming Option to New Hope, effectively deprived its shareholders of the right to a free and informed vote.

B. Scope of Review

"This Court's standard and scope of review as to facts on appeal from a preliminary injunction is whether, after independently reviewing the entire record, we can conclude that the findings of the Court of Chancery are sufficiently supported by the record and are the product of an orderly and logical deductive process." *QVC*, 637 A.2d at 37 n. 3 (citing *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1342–41 (Del. 1987). Legal conclusions made by the Court of Chancery are subject to *de novo* review. Lawson, 897 A.2d at 743.

C. Merits of the Argument

i. **The Gaming Option Improperly Coerced Shareholders to Vote for New Hope's** Financially Deficient Bid.

Under Delaware law, a board of directors is prohibited from taking action that deprives or coerces shareholder voting. *Blasius Indus. v. Atlas Corp.,* 564 A.2d 651 (Del.Ch.1988) (prohibiting a corporate board of directors from taking action "for the sole or primary purpose of thwarting a shareholder vote unless there is a compelling justification for such action."). Accordingly, a board of directors may violate the principles set forth in *Blasius* where its conduct coerces a shareholder to cast a meaningless vote. *See Carmody v. Toll Bros., Inc.*, 723 A.2d 1180 (Del. Ch. 1998).

In *Carmody*, the Chancery Court denied the board of directors' motion to dismiss allegations that the "dead hand" poison pill at issue thwarted shareholder voting. *Id.* at 1194. Specifically, plaintiffs alleged that the provisions in the poison pill, which provided incumbent directors with exclusive redemption powers, either precluded a hostile proxy contest or forced shareholders to vote for incumbent directors. *Id.* The court noted that "[a] claim that the directors have unilaterally created a structure in which shareholder voting is either impotent or selfdefeating [sic] is necessarily a claim of purposeful disenfranchisement." *Id.* at 1193.

As a general principle, courts have recognized shareholder voting as the "ideological underpinning upon which the legitimacy of directorial power rests." *Blasius*, 564 A.2d at 659.

> Provisions in corporate instruments that are intended principally to restrain or coerce the free exercise of the stockholder franchise are deeply suspect. The shareholder vote is the basis upon which an individual serving as a corporate director must rest his or her claim to legitimacy. Absent quite extraordinary circumstances, in my opinion, it constitutes a fundamental offense to the dignity of this corporate office for a director to use corporate power to seek to coerce shareholders in the exercise of the vote.

Sutton Holding Corp. v. Desoto, Inc., 17 Del. J. Corp. L. 363, 366 (1991) (denying summary judgment to a challenge to a board-adopted amendment that effectively thwarted shareholder elected directors).

Given the importance of shareholder voting, courts are deeply suspect of votes that were cast as a product of coercion. *See Eisenberg v. Chicago Milwaukee Corp.,* Del.Ch., 537 A.2d 1051, 1062 (1987). In *Eisenberg*, the Chancery Court granted a preliminary injunction upon a determination that CMC's self-tender offer was impermissibly coercive. *Id.* Specifically, CMC's preferred shareholders were effectively forced to tender their shares because a refusal to do so would have automatically delisted all remaining shares from the New York Stock Exchange. *Id.; see also Williams v. Geier*, 671 A.2d 1368, 1382-83 (Del. 1996) (noting that a board is prohibited from structuring a transaction to coerce shareholders to vote in favor of a transaction for some reason other than its merits)

Here, the Gaming Option effectively deprived Praise Video shareholders of their statutory right to vote on the transaction in violation of *Blasius*. By exclusively offering the financially deficient Gaming Option to New Hope, the Praise board of directors coerced shareholders to approve the merger by appealing to the public benefit identified in Praise's certificate of incorporation. However, the board of directors was required to allow its shareholders to voluntarily exercise their voting rights on the basis of the merits of each bid. *Williams*, 671 A.2d at 1382-83. Notwithstanding the board of directors' good faith intentions, it was not permitted to balance the pecuniary considerations with the public benefit on behalf of the shareholders. This is especially true where the board of directors did not require either New Hope or Mercer to agree to a post-merger public benefit provision.

Additionally, the Praise board of directors improperly coerced its shareholders to vote in favor of New Hope's bid by structuring the transaction "in which shareholder voting is either impotent or self defeating." *Carmody*, 723 A.2d at 1193. Specifically, the exclusive grant of the Gaming Option to New Hope caused its $41 bid to remain as the only viable option for Praise video shareholders to select: a winning bid by Mercer would have automatically resulted in the sale of Praise Video's gaming Division to New Hope. Knowing the potential for such outcome, Mercer would have arguably revoked its bid. This is supported by the fact that Mercer tendered its bid upon consideration of acquiring Praise in its entirety. (Op. 7).

Due to the Gaming Option, shareholders only options were to either (a) agree to New Hope's economically deficient bid or (b) agree to Mercer's bid (or another potential bidder), while selling its core profitable line of business at 40% below its true value to New Hope, pursuant to the Gaming Option. In other words, Praise Video shareholders were forced to cast a self-defeating and meaningless vote in violation of the "free exercise of he stockholder franchise." *Sutton,* 17 Del. J. Corp. L. at 366. Thus, the Praise Board deprived its shareholders of *their right to vote in violation of Blasius.*

ii. The Praise Board of Directors Failed to Establish Any Compelling Justification for Their Actions.

In light of its conduct, the Praise board of directors has failed to show any compelling justification for issuing the Gaming Option, which ultimately deprived Praise shareholders of their right to vote on the transaction. Specifically, awarding the Gaming Option to New Hope on the basis that it was better suited to promote Praise Video's public benefits is unwarranted. First, the Praise Board's concern regarding the post-sale promotion of its public benefit provision is meritless, because neither New Hope nor Mercer's bids were required to include a post-sale public benefit provision. (Op. 9). Furthermore, there was no guarantee that a sale to New Hope would continue the promotion of Praise Video's public benefit: Miller Price's limited partnership agreement requires that in the event of an unresolved deadlock between the two principals—one of whom is not a member of the Church—the principals are required to either buy out the other principal's interest or pursue liquidation proceedings. (Op. 6). Accordingly, a dispute between Miller Price's principals could have easily resulted in Praise Video being controlled by an individual who was not personally bound to the Church and/or continue the public benefit. Thus, the Praise Board did not have a compelling justification for issuing New Hope the Gaming Option, which served to thwart a free shareholder vote.

CONCLUSION

Based on the foregoing, defendants violated their fiduciary duties to Praise Video shareholders, failed to balance the relevant interests in managing Praise Video as a public benefit corporation, and improperly coerced a vote in favor of defendant New Hope. Accordingly, the Court of Chancery found that a preliminary injunction was an appropriate remedy based on plaintiff's likelihood of success on the eventual merits. This Court should affirm the Court of Chancery and find that plaintiffs have a likelihood of success on the merits of their claim.