

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PRAISE VIDEO, INC., a Delaware	)	
Corporation, JACOB BISSINGER,	)	
FRANCIS PENNOCK, HOWARD METCALF,	)	
PETER HORNBERGER, NEW HOPE	)	
PUBLISHING CO., and PRAISE NEW	)	No. 43, 2014
HOPE CORP.,	)	
	)	
	)	
Defendants Below,	)	
Appellants,	)	
	)	
v.	)	
	)	
MERCER CHRISTIAN PUBLISHING CO, and	)	On Appeal from the Court of
SUSAN BEARD,	)	Chancery of the State of
	)	Delaware
Plaintiffs Below,	)	C.A. No. 6943-CJ
Appellee.	)	

APPELLANTS' OPENING BRIEF

Team I
Attorneys for Defendants Below,
Appellants

Date Filed: February 7, 20

TABLE OF CONTENTS

<u>TABLE OF CONTENTS</u>	i
<u>TABLE OF CITATIONS</u>	iii
<u>NATURE OF PROCEEDINGS</u>	1
<u>SUMMARY OF THE ARGUMENT</u>	1
<u>STATEMENT OF FACTS</u>	2
<u>ARGUMENT</u>	6
I. THE COURT SHOULD REVERSE THE PRELIMINARY INJUNCTION ORDER BECAUSE PRAISE VIDEO MEETS THE BALANCING REQUIREMENT OF THE DELAWARE PUBLIC BENEFIT CORPORATION STATUTE AND THEREFORE, APPELLEES FAIL TO DEMONSTRATE A REASONABLE PROBABILITY OF SUCCESS ON THE MERITS.....	7
Questions Presented	7
Scope of Review	8
Merits of the Argument	8
A. <u>As A Public Benefit Corporation, Praise Video Is Permitted To Have A Corporate Interest In Promoting Religious Values.</u>	11
B. <u>The Board's Approval Of The New Hope Bid Was Necessary To Protect Praise Video's Corporate Policy Of Promoting Religious Values And Thus Such Conduct Meets The Unocal Standard For Appropriate Defensive Measures.</u>	13
C. <u>Revlon Violates The Intent And Purpose Behind Public Benefit Corporation Legislation And Therefore, Should Not Be Applied To The Praise Video Board of Directors' Decision To Approve The New Hope Bid.</u>	17
II. THE COURT SHOULD REVERSE THE PRELIMINARY INJUNCTION ORDER BECAUSE THE GAMING OPTION WAS NOT IMPERMISSIBLY COERCIVE AND THUS THE APPELLEES FAIL TO DEMONSTRATE A REASONABLE PROBABILITY OF SUCCESS ON THE MERITS BECAUSE THE STOCKHOLDERS WERE NOT DEPRIVED OF A FULL AND FAIR OPPORTUNITY TO VOTE ON THE MERITS OF THE TRANSACTION.....	21
Question Presented	21
Scope of Review	21

Merits of the Argument	22
<u>CONCLUSION</u>	25

TABLE OF CITATIONS

Delaware Supreme Court

<u>Barkan v. Amsted Indus.,</u> 567 A.2d 1279 (Del. 1989).....	9
<u>Brazen v. Bell Atl. Corp.,</u> 695 A.2d 43 (Del. 1997).....	22, 23 24
<u>Omnicare, Inc. v. NCS Healthcare, Inc.,</u> 818 A.2d 914 (Del. 2003).....	22
<u>Paramount Commc'ns, Inc. v. Time, Inc.,</u> 571 A.2d 1140 (Del. 1989).....	15, 16
<u>Revlon, Inc. v. Macandrews & Forbes Holdings, Inc.,</u> 506 A.2d 173 (Del. 1986).....	17
<u>SI Mgmt. L.P. v. Wininger,</u> 707 A.2d 37 (Del. 1998).....	8, 21, 22
<u>Sinclair Oil Corp. v. Levien,</u> 280 A.2d 717 (Del. 1971).....	9, 11
<u>Stroud v. Grace,</u> 606 A.2d 75 (Del. 1992).....	22, 23, 24
<u>Unitrin, Inc. v. Am. Gen. Corp.,</u> 651 A.2d 1361 (Del. 1995).....	14
<u>Unocal Corp. v. Mesa Petrol. Co.,</u> 493 A.2d 946 (Del. 1985).....	9, 13, 14, 15, 17
<u>Williams v. Geier,</u> 671 A.2d 1368 (Del. 1996).....	22, 23, 24

Delaware Chancery Court

<u>Air Prods. & Chems., Inc. v. Airgas, Inc.,</u> 16 A.3d 48 (Del. Ch. 2011).....	14, 15, 22
<u>Blasius Indus. v. Atlas Corp.,</u> 564 A.2d 651 (Del. Ch. 1988).....	23, 24, 25
<u>Cantor Fitzgerald, L.P. v. Cantor,</u> 724 A.2d 571 (Del. Ch. 1998).....	7
<u>Consolidated Forest Indus. Co. v. BTRta Forest Prods., Inc.,</u> C.A. No. 6943-CJ, 1 (Del. Ch. 2012).....	18, 19, 20
<u>Gradient OC Master, Ltd. v. NBC Universal, Inc.,</u> 930 A.2d 104 (Del. Ch. 2007).....	22

<u>In re Cogent, Inc. S'holder Litig.,</u> 7 A.3d 487 (Del. Ch. 2010).....	9
---	---

<u>In re Dollar Thrifty S'holder Litig.,</u> 14 A.3d 573 (Del. Ch. 2010).....	9
--	---

Federal Courts

<u>Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.,</u> 724 F.3d 377 (3d Cir.).....	12, 13
--	--------

<u>Hilton Hotels Corp. v. ITT Corp.,</u> 978 F. Supp. 1342 (D. Nev. 1997).....	14
---	----

<u>Hobby Lobby Stores, Inc. v. Sebelius,</u> 723 F.3d 1114 (10th Cir.).....	12
--	----

Statutes and Legislative History

Del. Code Ann. tit. 8, § 102 (West 2013).....	20
---	----

Del. Code Ann. tit. 8, § 362 (West 2013).....	7, 8, 12, 13, 15, 18, 19, 20
---	------------------------------

Del. Code Ann. tit. 8, § 363 (West 2013).....	18
---	----

Del. Code Ann. tit. 8, § 365 (West 2013).....	8, 9, 11, 12, 17, 25
---	----------------------

Del. Comm. Report, S.B. 47, 147th Gen. Assembly, Reg. Sess. (May 15, 2013).....	15
--	----

Other Authorities

<u>Governor Markell Signs Public Benefit Corporation Legislation, State of Del. (July 17, 2013),</u> http://news.delaware.gov/2013/07/17/governor-markell-signs-public-benefit-corporation-legislation/	17
--	----

Nature of Proceedings

On December 13, 2013, Appellees, Mercer Christian Publishing Co. ("Mercer") and Susan Beard, brought action against Appellants, Praise Video, Inc. ("Praise Video"), Jacob Bissinger, Francis Pennock, Mark Van Zandt, Howard Metcalf, Peter Hornberger, New Hope Publishing Co. ("New Hope"), and Praise New Hope Corp., on claims of breach of fiduciary duty by Praise Video directors and seeking a preliminary injunction against consummation of the merger between Praise Video and New Hope. The Appellants agreed to defer a taking of the stockholder vote on and consummation of the merger until as late as March 31, 2014, as necessary to permit a decision from the Court and in the event of an appeal, from the Delaware Supreme Court.

On January 14, 2014, Chancellor Develin of the Delaware Court of Chancery granted the Appellees request for a preliminary injunction. On January 22, 2014, the Appellants filed a Notice of Appeal, in the Supreme Court of Delaware, seeking a reversal of the preliminary injunction. The interlocutory appeal was accepted by the Supreme Court of Delaware on January 23, 2014.

SUMMARY OF THE ARGUMENT

[1] This Court should reverse the Chancery Court's preliminary injunction order because Praise Video's board of directors' properly balanced stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefits identified in its certificate of incorporation in making the decision to approve the New Hope bid. The board's decision was informed, disinterested, and based on a rational business purpose of

wanting to maintain the corporation's public benefit. As a public benefit corporation, Praise Video is permitted to have a corporate interest in promoting religious values and should be afforded the advantages of that corporate form. Furthermore, the religious oriented conduct of the corporation post-merger is a legitimate concern for the Praise Video board of directors. Approving the New Hope bid was an appropriate defensive measure, as it was reasonable in relation to the threat Mercer's bid posed to Praise Video's corporate policy and effectiveness. Additionally, Revlon should not be applied to directors of public benefit corporations not only because it violates the intent and purpose behind public benefit corporation legislation, but it also conflicts with the directors' duties expressed in section 365 of the public benefit corporation statute.

[2] The gaming option provision in the New Hope bid was not impermissibly coercive, as stockholders were not deprived of a full and fair opportunity to vote on the merits of the transaction. However, if the Court finds that the primary purpose of the gaming option was to thwart a stockholder vote, it is still validated by the compelling justification of securing the corporation's only viable offer, which achieved each element of the balancing requirement.

STATEMENT OF FACTS

Since Praise Video's inception as a Delaware corporation in the mid-1970s, Jacob Bissinger has served as CEO and a director, owning approximately 22% of Praise Video shares with the other five directors owning in the aggregate about 4% of the shares. R. at 3-4. Praise Video's directors and almost all of the other stockholders,

approximately 250 in all, are either members of the Mennonite Church ("Church") or are related to members of the Church. R. at 4. From its inception, Praise Video has engaged in the production and distribution of wholesome filmed and digital entertainment as an alternative to the violent or sexually offensive entertainment generally offered by secular media entities. Id. Praise Video has experienced consistent financial success, with recent years' earnings averaging around \$4 Million, or about \$4 per share, with at least 60% of the profits being attributed to its gaming division. Id.

In early 2013, upon Bissinger's decision to retire as CEO of Praise Video within a year, the Praise Video board of directors retained financial adviser Norman Stoltzfus to explore possible transactions in which the corporation's stockholders could liquidate their investment. R. at 6. By June 2013, Stoltzfus had identified a number of potential bidders to acquire Praise Video for stock or cash including Mercer which expressed an interest in acquiring and expanding Praise Video's gaming division. R. at 7. Although Mercer engages in producing and distributing Christian faith based products, it is an indirect wholly-owned subsidiary of Mercer Media, Inc. ("Mercer Media") which is a large, multinational, secular media conglomerate, the stock of which is traded on the New York Stock Exchange. R. at 5, 11. Mercer suggested that a modest capital infusion and collaboration with its own publications and gaming operations could dramatically expand Praise Video's customer base, and that an acquisition price above \$40 was possible. R. at 7.

The Praise Video board met on June 24, 2013, where Stoltzfus

reported on the results of his search and Mercer's interest. Id. After inquiry by the board, Stoltzfus indicated that the market growth predicted by Mercer could be anticipated in the area of combat-oriented video games. Id. This indication provoked consternation on the part of several directors, including Bissinger and Howard Metcalf, who noted that expansion into combat-oriented games violated Praise Video's religious obligation, expressed in formal Church doctrine, to "witness against all forms of violence, including war among nations." Id. Director Samuel Holbrook expressed reservations about the board attempting to dictate how Praise Video would operate after the sale, and he maintained that directors were obligated to achieve the best price for stockholders. R. at 8. Counsel for Praise Video advised that Holbrook was essentially correct, but reorganizing as a public benefit corporation would alter their legal obligations. Id. Based upon that report, the directors, with Holbrook dissenting, voted to approve reorganizing and merging into a public benefit corporation. Id.

On September, 30, 2013, in presenting the reorganization merger for a stockholder vote, the board informed the stockholders it was exploring a possible sale of the company and that the accomplishment of the reorganization merger would likely afford the directors legal flexibility to take into consideration Mennonite values as well as the maximization of stockholder wealth. R. at 9. The text of the Delaware public benefit statute, which became effective in August 2013, was included in the notice of the stockholder meeting. Id. Over 90% of Praise Video's outstanding shares were voted in favor of the reorganization merger. R. at 5. Shortly after the reorganization

merger, Mercer acquired about 2% of Praise Video's shares, for \$35 per share, from a dissenting stockholder. Id.

The board directed Stoltzfus to further seek potential bidders that could offer the best price for stockholders while also conducting future operations in compliance with Church doctrine. R. at 8. Stoltzfus's extended search resulted in Francis Pennock, a Praise Video director, concluding he could assemble a bid with a price matching what Mercer had suggested while complying with Praise Video's business practices and without expanding into religiously questionable areas. R. at 9. Consequently, New Hope was formed for purposes of acquiring Praise Video, with New Hope's wholly-owned subsidiary, Praise New Hope Corp., merging with Praise Video upon Praise Video stockholder approval. R. at 6. Miller Price L.P., ("Miller Price") owning 80% of New Hope's stock, is a limited partnership which engages in capital investments focusing on companies that seek to balance financial gains with religious values. Id. Isaac Miller, one of Miller Price's two principals, is a member of the Church, as is Pennock who owns approximately 20% of New Hope stock. Id.

In November 2013, with Pennock abstaining and absenting himself from further deliberation, the board directed all potential bidders to submit their best bids by close of business on December 5, 2013. R. at 9. Only Mercer and New Hope submitted bids, of \$50 per share and \$41 per share, respectively. Id. Although, neither Mercer nor New Hope agreed that the company's post-merger certificate of incorporation would include the public benefit provision in Praise Video's existing charter, New Hope pledged that Pennock would be the CEO of Praise

Video following the acquisition and he would operate Praise Video in a manner consistent with Church values. R. at 9-10. New Hope also conditioned its bid on an option to acquire Praise Video's gaming division ("gaming option") for \$18 million, payable in five-year installment notes, if the merger failed to gain Praise Video stockholder approval. R. at 10.

On December 9, 2013, with nothing materially lacking in their informational base, the board met for over seven hours to evaluate the bids. Id. Stoltzfus and Praise Video's counsel reviewed the background of the bidding process, the likely impact of the gaming option, and the prospects for any further bids, and concluded the company had been thoroughly shopped with no prospects of superior bids forthcoming in a reasonable time. R. at 11. The board expressed concerns about the potential impact of Mercer being subject to the ultimate control of Mercer Media, its ability to promote the public benefit specified by Praise Video's certificate of incorporation, and the likelihood that it would expand its operations into combat oriented games. R. at 10. After carefully evaluating the details of both bids, the board voted four to one, with Holbrook dissenting and Pennock recusing himself, in favor of approving the New Hope bid because it appropriately balanced the stockholders' pecuniary interests, the best interests of those materially affected by Praise Video's conduct, and the public benefit identified in its certificate of incorporation. R. at 11.

ARGUMENT

A preliminary injunction may only be obtained if plaintiffs establish the following three elements: "(1) a reasonable likelihood

of success on the merits, (2) imminent, irreparable harm will result if an injunction is not granted and (3) the damage to Plaintiff if the injunction does not issue will exceed the damage to the defendants if the injunction does issue.” Cantor Fitzgerald, L.P. v. Cantor, 724 A.2d 571, 579 (Del. Ch. 1998). Here, the Court of Chancery improperly granted the Appellees’ preliminary injunction motion because they failed to demonstrate a reasonable probability of success on the merits. A preliminary injunction is inappropriate because in deciding to approve the New Hope bid, the Praise Video board of directors satisfied the statutorily mandated balancing requirement for public benefit corporations. Del. Code Ann. tit. 8, § 362(a) (West 2013). Additionally, the New Hope bid gaming option provision was not impermissibly coercive and thus did not deprive stockholders of a full and fair opportunity to vote on the merits of the transaction. Therefore, this Court should reverse the preliminary injunction order because Appellees fail to demonstrate a reasonable probability of success on the merits.

I. THE COURT SHOULD REVERSE THE PRELIMINARY INJUNCTION ORDER BECAUSE PRAISE VIDEO MEETS THE BALANCING REQUIREMENT OF THE DELAWARE PUBLIC BENEFIT CORPORATION STATUTE AND THEREFORE, APPELLEES FAIL TO DEMONSTRATE A REASONABLE PROBABILITY OF SUCCESS ON THE MERITS.

Questions Presented

1. Did the Praise Video board of directors meet the statutorily mandated balancing requirements for public benefit corporations?

2. Does a public benefit corporation have a corporate interest in promoting religious values?
3. Is the religious oriented conduct of the corporation's business, post-merger, an appropriate concern to be taken into account by a Praise Video's board of directors?

Scope of Review

Delaware courts review the grant or denial of a preliminary injunction for abuse of discretion, but without giving deference to the legal conclusions of the Court of Chancery. SI Mgmt. L.P. v. Wininger, 707 A.2d 37, 40 (Del. 1998). This Court should review the legal principles applied by the Court of Chancery regarding the merger agreement, *de novo*. Id.

Merits of the Argument

The Delaware Code provides a public benefit corporation is "a for-profit corporation...that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner." tit. 8, § 362(a). Additionally, the directors and officers of public benefit corporations have a statutorily mandated duty to manage the corporation in "a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefits identified in its certificate of incorporation." Id. § 365(a).

The business judgment rule presumes that in managing the business and affairs of the corporation, the directors were informed and acting in good faith with an honest belief that the decision would be in the best interest of the corporation. Unocal Corp. v. Mesa Petroleum Co.,

493 A.2d 946, 954 (Del. 1985). Section 365 of the public benefit corporation statute abides by the business judgment rule providing if a director makes decisions while following the balancing requirement of subsection (a), their decisions will satisfy their "fiduciary duties to stockholders and the corporation if such...decision is both informed and disinterested and not such that no person of ordinary, sound judgment would approve." tit. 8, § 365(b). Additionally, where a board of directors can attribute a rational business purpose for their decisions, the court may not substitute its own judgment for that of the board's. Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971).

In regards to maximizing stockholder wealth, Delaware case law maintains there is no single path that directors must follow. In re Cogent, Inc. S'holder Litig., 7 A.3d 487, 497 (Del. Ch. 2010); Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286 (Del. 1989). "Directors are generally free to select the path to value maximization, so long as they choose a reasonable route to get there." In re Dollar Thrifty S'holder Litig., 14 A.3d 573, 595-96 (Del. Ch. 2010).

Praise Video's board of directors' decision to merge with New Hope meets the statutory balancing requirement of section 365(a) because after thoroughly evaluating both the Mercer and New Hope bids, only the New Hope bid fulfilled each balancing prong whereas Mercer's only fulfilled one. R. at 11. New Hope's bid of \$41 per share matched Mercer's preliminary suggestion and was more than satisfactory considering Praise Video's recent years' earnings equaling out to approximately \$4 per share. R. at 4, 9. After consulting Stoltzfus,

their hired financial adviser, and the company's legal counsel the board determined \$41 was a reasonable price and concluded that the pecuniary interests of the stockholders were well served, thus satisfying the first element of the balancing requirement. R. at 11.

In regards to those materially affected by Praise Video's conduct such as, its customers, stockholders, and society in general, the board feared Mercer's gaming expansion into combat-oriented video games would violate their specific public benefit and their commitment to providing wholesome entertainment as an alternative to the violently offensive entertainment generally offered by secular media entities. R. at 4. However, by merging with New Hope, Praise Video will be able to continue to promote the values of the Mennonite faith and be assured that its public benefit of religious values will carry on after the merger. R. at 10.

Taking into account Praise Video's specific public benefit, the board believed Mercer's anticipated expansion into combat oriented video games violated the religious obligation of the Church doctrine that provides to "witness against all forms of violence, including war among nations." R. at 7. However, New Hope agreed that as long as Pennock was CEO of the resulting corporation, he would operate the company in a manner consistent with Church values, whereas Mercer failed to make the same agreement. R at 10. Additionally, Mercer is a wholly-owned subsidiary of Mercer Media, a multinational secular media conglomerate and thus, subject to its ultimate control. R. at 11.

The directors met for over seven hours to evaluate and determine how to respond to the bids and the Appellees agree there was nothing

material lacking in the directors' informational base, thus fulfilling the statutory requirement of section 365(b) that their decision be "informed." R. at 10; tit. 8, § 365(b). The directors concluded the company had been thoroughly shopped with no other prospects of superior bids on the horizon. R. at 11. After careful evaluation, the directors voted four to one, with Holbrook dissenting and Pennock recusing himself, in favor of approving the New Hope bid because it appropriately balanced the three statutorily mandated balancing requirements of section 365(a). Id.

In making the decision to approve the merger with New Hope, the board balanced the lower, yet reasonable New Hope bid with the best interests of those materially affected by the corporation and Praise Video's specific public benefit of promoting the values of the Mennonite faith. Id. Consequently, the board's decision to approve the merger with New Hope, and the related gaming option agreement, was "both informed and disinterested and not such that no person of ordinary, sound judgment would approve." tit. 8, § 365(b). Therefore, the directors satisfied their "fiduciary duties to the stockholders and the corporation." Id. Praise Video's board can attribute a "rational business purpose" of wanting to maintain the corporation's public benefit and therefore, the court should not substitute its own judgment for that of the board's. Sinclair Oil Corp., 280 A.2d at 720.

A. As A Public Benefit Corporation, Praise Video Is Permitted To Have A Corporate Interest In Promoting Religious Values.

When the court evaluates whether directors adequately balanced the best interests of those materially affected by the corporation's

conduct and its specific public benefit(s), it needs to consider the specific public benefit identified in the certificate of incorporation. tit. 8, §§ 362, 365. The statute specifically states that a "public benefit means a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities, or interests...including...effects of a religious...nature." tit. 8, § 362(b). The statute expressly allows for the promotion of religious values as an accepted public benefit and thus it is an appropriate corporate interest. tit. 8, § 362(b).

Although the question of whether for-profit secular corporations can participate in religious expression is to be decided by the United States Supreme Court later this year, this litigation does not affect public benefit corporations in having a corporate interest in promoting religious values. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir.), cert. granted, 134 S. Ct. 678 (U.S. 2013); Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377 (3d Cir.), cert. granted, 134 S. Ct. 678 (U.S. 2013). Although Conestoga Wood Specialties Corp. held that general business corporations cannot freely exercise religion, public benefit corporations are distinguishable from general business corporations. Id. at 385. The Third Circuit Court of Appeals found that because Conestoga Wood Specialties chose to incorporate as a general business corporation it obtained "both the advantages and disadvantages of the corporate form." Id. at 388. Likewise, a public benefit corporation should be afforded the advantage of promoting a statutorily accepted public benefit. tit. 8, § 362(b).

Praise Video chose to reorganize as a public benefit corporation, which allows it to identify in its certificate of incorporation "one or more specific public benefits to be promoted by the corporation." R. at 8; tit. 8, § 362(b). Praise Video's certificate of incorporation identifies its public benefit as a positive effect of a religious nature through "the promotion of the values articulated in the Confession of Faith in a Mennonite Perspective." R. at 3. Just as Conestoga Wood Specialties as a general business corporation has to shoulder the advantages and disadvantages of the corporate form, Praise Video should be afforded the advantages of the public benefit corporate form, which is not only operating their corporation for a profit, but for the public benefit of promoting the values of the Mennonite faith. R. at 3.; Conestoga Wood Specialties Corp., 724 F.3d at 385.

B. The Board's Approval Of The New Hope Bid Was Necessary To Protect Praise Video's Corporate Policy Of Promoting Religious Values And Thus Such Conduct Meets The Unocal Standard For Appropriate Defensive Measures.

When a board of directors is faced with a pending takeover bid, it has an obligation to determine whether the offer is in the best interests of the corporation. Unocal Corp., 493 A.2d at 954. These types of decisions are no less entitled to the deference given under the business judgment rule than other decisions made for the corporation. Id. However, because in takeover situations there is an elevated risk the board may be acting primarily in its own interests instead of those of the corporation and its shareholders, courts must

apply a heightened scrutiny before the protections of the business judgment rule may be conferred. Id. Because of this inherent conflict of interest, Unocal sets out a two-pronged test courts should apply in takeover situations to determine whether the business judgment rule is afforded to the directors who enacted the takeover defenses. Id. at 955.

Under the first prong of the test, directors have the burden of showing "they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed." Id. Courts have held the first prong of the Unocal standard is met where it is demonstrated that an acquiring company will likely pursue a different corporate policy and the board conducts a good faith and reasonable investigation into the perceived threat. Hilton Hotels Corp. v. ITT Corp., 978 F. Supp. 1342, 1348 (D. Nev. 1997); Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 92 (Del. Ch. 2011). Under the second prong, the defensive measure(s) used by the directors must be reasonable in relation to the threat posed. Unocal Corp., 493 A.2d at 955. This is a balancing element which includes an analysis by the directors of the nature of the takeover bid and its effect on the corporate enterprise. Id. The specific nature of the threat determines the range of permissible defensive measures in each case. Air Prods. & Chems., Inc., 16 A.3d at 122. Therefore, where a board's response is proportional to a reasonably perceived threat, the second prong of the Unocal standard is met. Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1376 (Del. 1995). Where directors satisfy both prongs under Unocal, they are afforded the business judgment rule. Unocal

Corp., 493 A.2d at 955.

Directors are not obligated to abandon a deliberately conceived corporate vision for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy. Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1154 (Del. 1989). If a company plans to maintain its corporate vision and control in the company, a board of directors is not required to maximize shareholder value in the short term, even in the context of a takeover. Id. at 1150; Air Prods. & Chems., Inc., 16 A.3d at 112. Corporate transactions that might be construed as simply putting a corporation either "in play" or "up for sale" still allow for the directors' actions to be evaluated under Unocal. Paramount Commc'ns, 571 A.2d at 1151 (holding directors' defensive measures satisfied Unocal test because their decision to take a lower priced offer was reasonable in relation to threat posed to Time's corporate vision).

In regards to public benefit corporations, the Unocal test can still be applied when directors enact defensive measures to thwart a takeover. See Unocal Corp., 493 A.2d at 954. However, in applying Unocal, courts should evaluate the threat and the reasonableness of the response in connection with the statutory aspects of public benefit corporations. See tit. 8, § 362(a). A public benefit corporation is a corporate entity that is managed not only for the stockholders' pecuniary interests, but also for the benefit of other persons, entities, communities, or interests. Del. Comm. Report, S.B. 47, 147th Gen. Assembly, Reg. Sess. (May 15, 2013).

Similar to Paramount Commc'ns, the directors' decision to approve

New Hope's bid should be evaluated under Unocal, because there was a plan to maintain Praise Video's corporate vision of promoting the values of the Mennonite faith. R. at 3; Paramount Commc'ns, 571 A.2d at 1150-51. The directors of Praise Video took specific steps to reorganize as a public benefit corporation to allow the directors more flexibility in making sure Praise Video would retain its corporate vision in promoting religious values. R. at 8-9. Additionally, Praise Video will not be giving up complete control because it will maintain a presence on the board of directors, post-merger, through Pennock serving as director and CEO of the resulting corporation. R. at 7-8.

The statutory balancing requirement along with Praise Video's specific public benefit of promoting the values of the Mennonite faith need to be taken into account when courts are applying the Unocal test. Praise Video satisfies the first prong of the Unocal test by showing they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed. R. at 7. Mercer's anticipated plan to expand the gaming division to include combat-oriented video games violated the values of the Mennonite faith, and therefore threatened Praise Video's corporate policy. Id. The New Hope bid appropriately balanced the three statutorily mandated factors set forth in Delaware's public benefit corporation statute. R. at 11. Specifically, Pennock promised to operate the company in accordance with the company's core public benefit values. R. at 10. In order to secure the New Hope bid, the company's only viable offer, the board had to accept New Hope's gaming option condition. R. at 10-11. Since there were no alternative measures available, approving the New Hope

bid was a reasonable response to the threat and thus it satisfies the second prong of the Unocal test. Unocal Corp., 493 A.2d at 955.

Therefore, the Court should apply the business judgment rule and defer to the board's decision. Id.

C. Revlon Violates The Intent And Purpose Behind Public Benefit Corporation Statute And Therefore, Should Not Be Applied To The Praise Video Board of Directors' Decision To Approve The New Hope Bid.

Although Unocal's two prong test is applied when directors implement a takeover defense to protect corporate policy and effectiveness, corporate law precedent dictates a different rule be applied when the break-up of a company is inevitable and directors are no longer protecting the corporate vision. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986). In such situations, Revlon holds directors are to serve as auctioneers whose duty it is to get the best price for stockholders. Id.

However, Revlon is in direct conflict with the director duties set out in section 365 of the public benefit corporation statute and the justification behind the establishment of public benefit corporations. See tit. 8, § 365. Due to the fact that public benefit corporations are fairly new in Delaware, the statute only being enacted in August 2013, the court should consider setting a precedent on how defensive measures by the board are handled in public benefit corporations, rather than applying law that violates the framework or purpose behind public benefit corporation statute.

The intent of the public benefit corporation legislation is not

simply just shareholder wealth maximization, but the promotion of public benefits. tit. 8, § 362(a). Section 363 of the public benefit corporation statute requires 90% of stockholder approval for a corporation to become a public benefit corporation, leading to the logical conclusion that approval of the reorganization indicates stockholders acknowledged and accepted shareholder wealth maximization would no longer hold the weight it did in the pre-public benefit entity. Id. § 363.

Eight months before the enactment of the public benefit corporation statute, a corporate charter provision that included a balancing requirement for directors akin to the balancing requirement of section 362(a) was found to be invalid as violating Revlon. Consolidated Forest Indus. Co. v. BTRta Forest Prods., Inc., C.A. No. 6943-CJ, 1 (Del. Ch. 2012). In Consolidated, BTRta is one of the world's largest producers of paper and wood products, while also focused on minimizing the adverse environmental impact of production. Id. at 4. After deciding to sell the company, the board of directors, including the two founders of BTRta, agreed to accept a proposal from CFI to acquire BTRta for \$17 per share (25% over market price). Id. at 9. Having concerns about the company continuing to maintain the environmentally responsible practices promoted by BTRta, the merger agreement allowed BTRta to seek out and terminate the merger in the event of finding a "Superior Proposal" within sixty days. Id. at 9-10. Under the agreement, a "Superior Proposal" included any merger proposal that BTRta's board deemed in good faith would better serve the best interests of BTRta, as defined under Article II of BTRta's

certificate of incorporation. Id. at 10.

Article II of BTRta's certificate of incorporation provided a definition of "best interests" that mirrors what directors must take into account when managing public benefit corporations. Id. at 6; tit. 8, § 362. These interests include short and long-term stockholder interests, interests of those materially affected by the company, such as the society at large, and the environmental impact of the company's operations. Consolidated Forest Indus. Co., C.A. No. 6943-CJ, 1 at 6. Article II also provided a director's decision to accept a lower priced offer over a higher one, would not be a breach of any fiduciary duty if based on a weighing of the company's "best interests" against shareholders' interests. Id.

Ravert Ward then offered BTRta \$15.50 per share and assured BTRta that operations would continue to be environmentally responsible with the founders having an active consulting role. Id. at 11. After discussing the merger would offer stockholders a premium to pre-merger market prices, and concluding BTRta's environmentally responsible practices and societal interests would be best served with Ravert Ward, the board found the bid to be a "Superior Proposal" and approved the merger. Id. In response, CFI brought suit to enjoin the merger alleging it violated the fiduciary duties of BTRta's directors. Id. at 13.

The court held the provision in Article II to be invalid because the choice it provided plainly violated Revlon. Id. at 14. However, the definition of "best interests" in Article II follows directly with the balancing requirement of section 362(a). See tit. 8, § 362(a). As

a consequence of the public benefit corporation statute not becoming effective until August 2013, BTRta did not have the opportunity to become a public benefit corporation. It is likely if BTRta had been a public benefit corporation at the time this case was heard, the Chancery Court would have held differently. See Id. § 362.

Although, the court also found title 8, section 102(b)(7) of the Delaware Code does not permit directors to promote broader societal interests at the expense of stockholders' interests, the later enacted public benefit corporation statute does. Consolidated Forest Indus. Co., C.A. No. 6943-CJ, 1 at 16; tit. 8, § 362(a). The court found the directors' reliance on societal interests constituted a breach of their fiduciary duty to the stockholders, but eight months later Delaware enacted legislation that provides otherwise. Consolidated Forest Indus. Co., C.A. No. 6943-CJ, 1 at 16. According to section 362(a), if the best interests of those materially affected by the corporation's conduct (society and the community included) and the specific public benefit, in this case, environmental responsibility, outweigh pecuniary interests of stockholders, a decision can be made in regards to the balancing results without the directors violating any fiduciary duties. tit. 8, § 362(a).

Ninety percent of Praise Video's stockholders voted in favor of reorganizing Praise Video as a public benefit corporation and were aware it "would likely afford the directors greater legal flexibility in the sale of the company to take into consideration Mennonite values." R. at 9. The stockholders were aware that the public benefit corporation statute alters director duties. Id. The enactment of the

public benefit corporation statute suggests that the Delaware legislature sought for courts to evaluate the decisions of public benefit corporation directors of companies with corporate purposes like BTRta and Praise Video in a different light. However, because BTRta did not have the option of becoming a public benefit corporation, Praise Video is a different corporate form than BTRta and should be treated as such. Therefore, because Praise Video's directors' decision to approve the New Hope bid satisfies the Unocal standard for defensive measures and because Revlon should not apply to Praise Video, as it violates the intent of the Delaware legislature and purpose of the public benefit corporation statute, the Court should reverse the preliminary injunction.

II. THE COURT SHOULD REVERSE THE PRELIMINARY INJUNCTION ORDER BECAUSE THE GAMING OPTION WAS NOT IMPERMISSIBLY COERCIVE AND THUS THE APPELLEES FAIL TO DEMONSTRATE A REASONABLE PROBABILITY OF SUCCESS ON THE MERITS BECAUSE THE STOCKHOLDERS WERE NOT DEPRIVED OF A FULL AND FAIR OPPORTUNITY TO VOTE ON THE MERITS OF THE TRANSACTION.

Question Presented

1. Whether the approval of the gaming option provision, by Praise Video's board of directors, was impermissibly coercive?

Scope of Review

Delaware courts review the grant or denial of a preliminary injunction for abuse of discretion, but without giving deference to the legal conclusions of the Court of Chancery. SI Mgmt. L.P., 707

A.2d at 40. This Court should review the legal principles applied by the Court of Chancery regarding the merger agreement, *de novo*. Id.

Merits of the Argument

In order to comply with the principles of Unocal, defensive measures taken by the board of directors may not be draconian, such as preclusive or coercive. Air Prods. & Chems., Inc., 16 A.3d at 113. Preclusion exists where a board's action effectively renders a stockholder vote against the board's recommendation "realistically unattainable" such as by being mathematically impossible to prevail. Id. The common definition of "coercion," such as intentionally persuading a person to prefer one option over another is not the same as impermissible coercion. Gradient OC Master, Ltd. v. NBC Universal, Inc., 930 A.2d 104, 117 (Del. Ch. 2007). Rather, impermissible coercion exists where a board's action has the effect of causing a stockholder vote to turn on some reason other than the merits of the transaction itself. Brazen v. Bell Atl. Corp., 695 A.2d 43, 50 (Del. 1997); Williams v. Geier, 671 A.2d 1368, 1383 (Del. 1996).

The Supreme Court of Delaware has stated that a determination of whether a board's course of action has robbed stockholders of a voluntary vote through coercion depends on the facts of each case. Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 935 (Del. 2003). Courts should deem actions by a board permissible where there is an absence of inequitable conduct on the part of the directors, and stockholders have a full and fair opportunity to vote. Stroud v. Grace, 606 A.2d 75, 92 (Del. 1992). Merely because measures adopted by the board may influence stockholders to vote one way or the other

regarding a board's proposal does not render such tactics impermissibly coercive. Brazen, 695 A.2d at 50 (holding no stockholder coercion when the board adopted a valid termination fee provision to influence the shareholders to vote for the proposal).

Delaware courts have noted where a corporation's board acts for the primary purpose of impeding a stockholder vote, the board must show a "compelling justification" for adopting such measures. Stroud, 606 A.2d at 92; Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 661 (Del. Ch. 1988). One justification for implementing defensive measures that may influence stockholders to vote in favor of a board proposal is in situations where the board knows better than the stockholders do as to what is in the corporation's best interest. Id. at 663. However, boards do not bear the burden of demonstrating a compelling justification absent evidence that the directors adopted the measures for the primary purpose of impeaching a stockholder vote. Williams, 671 A.2d at 1368. The "compelling justification" standard set forth in Blasius is extremely arduous, and consequently, courts rarely apply the standard. Id. at 1376.

In September 2013, over 90% of Praise Video shares were voted in favor of reorganizing as a public benefit corporation. R. at 5. The overwhelming approval of the reorganization merger by Praise Video stockholders indicates the majority of stockholders supported the board taking those values into consideration when selecting the best bid. R. at 5. Therefore, the board had no reason to believe the New Hope bid would be viewed unfavorably in the eyes of the stockholders and thus had no intent to accept the gaming option condition as a

method of thwarting the stockholder vote.

The New Hope bid was conditioned on stockholder approval. R. at 9. The board of directors, including Pennock, only own in the aggregate approximately 26% of Praise Video's outstanding stock meaning a rejection of the New Hope bid by stockholders was realistically attainable and therefore, not preclusive. R. at 3-4. Furthermore, impermissible coercion only exists where a stockholder vote turns on something other than the merits of the transaction. Brazen, 695 A.2d at 50. There is no evidence to suggest Praise Video directors threatened stockholders so as to cause a vote to turn on extrinsic factors. Rather, the stockholders were afforded a full and fair opportunity to vote on the merits of the transaction itself. R. at 9.

The New Hope bid was the only offer available which best balanced the interests of the stockholders, those materially affected by the corporation's conduct, and the public benefit identified in the corporation's certificate of incorporation. R. at 11. The "compelling justification" standard set forth in Blasius is only applicable where the primary purpose of the board's conduct is to obstruct the exercise of the stockholders' right to a full and fair opportunity to vote. Williams, 671 A.2d at 1376; Stroud, 606 A.2d at 92. The Praise Video directors had no desire to thwart the stockholder vote with the New Hope gaming option condition. Rather, the board's primary purpose for approving the New Hope bid with the gaming option condition was to secure the only viable offer available, and thus the board is not required to meet the onerous "compelling justification" test. R. at 9; See Blasius Indus., 564 A.2d at 661.

In the alternative, if the Praise Video board of directors' decision to approve the gaming option condition was found to be for the primary purpose of thwarting the stockholder vote, the board would still satisfy the "compelling justification" standard. Directors have a statutorily mandated duty to balance the three aforementioned factors listed in the Delaware public benefit corporation statute when managing the affairs of the corporation. tit 8, § 365(a). After careful evaluation, the board concluded the New Hope bid achieved all three statutorily mandated balancing requirements, whereas the Mercer bid only satisfied stockholder pecuniary interests. R. at 11. Implementing defensive measures that may influence stockholders to vote in favor of the New Hope bid was appropriate under Delaware law because the board knew better than the stockholders did as to what was in the corporation's best interest. Blasius Indus., 564 A.2d at 661.

Furthermore, due to the gaming option condition being necessary to secure the New Hope bid, the only viable offer available, the directors had no alternative but to approve the bid and present it to the stockholders for a vote, thus establishing a compelling justification. R. at 10. Therefore, the court should reverse the preliminary injunction order because the gaming option was not coercive and thus the stockholders were not deprived of a full and fair opportunity to vote on the merits of the transaction.

Conclusion

For the foregoing reasons, the Appellants respectfully request this Court reverse the preliminary injunction order by the Court of Chancery.