IN THE SUPREME COURT OF THE STATE OF DELEWARE

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, Appellants,	)	
v.	)	
MERCER CHRISTIAN PUBLISHING CO. and SUSAN BEARD,	)	On Appeal from the Court of Chancery of the State of Delaware
Plaintiffs Below, Appellees.	)	

APPELLEES' OPENING BRIEF

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Nature of Proceedings

This interlocutory appeal comes before the Supreme Court of Delaware on the application by the Defendants below: Praise Video, Inc., Jacob Bissinger, Francis Pennock, Mark Van Zandt, Howard, Metcalf, Peter Hornberger, New Hope Publishing Company, and Praise New Hope Corporation. Appellants are challenging the Court of Chancery's grant of a preliminary injunction in favor of Mercer Christian Publishing Company. This grant enjoined the merger of Praise Video and New Hope Corporation into Praise New Hope Corporation. Appellees brought this action for preliminary injunction against the consummation of the Merger on December 13, 2013, claiming breaches of fiduciary duties by the Praise Video board of directors. The Appellants filed their notice of interlocutory appeal on January 16, 2014, seeking review of the January 15, 2014, preliminary injunction order by Chancellor Sean Devlin. Pursuant to its authority under Supreme Court Rule 42, the Supreme Court of Delaware accepted the petition for interlocutory appeal on January 23, 2014.

Summary of the Argument

[1] The Praise Video board of directors failed to remain true to the fiduciary obligations owed to the stockholders and corporation under Delaware general corporate law and under the Public Benefit Corporation Statute. Under the Public Benefit Statute, the Praise Video directors were obligated to make management decisions through a balancing test, taking into account: the pecuniary interests of the shareholders, the best interests of those materially affected by the

corporation’s conduct, and the corporation’s established public benefit. By placing sole emphasis on the promotion of Mennonite values, the board of directors treated Praise Video’s public benefit as a dispositive element in blatant violation of the balancing requirement.

[2] Bissinger’s personal interest in maintaining Praise Video’s corporate vision and forcing that interest on the acquiring corporation pervaded the Praise Video board of directors. Bissinger’s decisions were not made based on the merits of the transaction. Instead, his allowed his personal interests to influence his decisions and the decisions of his fellow board members. As such, Bissinger violated the fiduciary duty of loyalty.

[3] The Praise Video board of directors entered into merger negotiations that made the breakup of the corporation inevitable. The board approved a merger transaction that included a substantially lower price per outstanding share of Praise Video stock. By failing to take the highest financial offer available the directors of Praise Video failed to achieve the best value for the stockholders; a blatant disregard for the Revlon duties imposed in the sale of a corporation.

[4] The Praise Video directors approved a Gaming Option for $12 million below the true value of its gaming division in order to thwart the stockholders’ freedom to reject the New Hope merger. In doing so the Praise Video directors coerced the stockholder vote into approving a merger. The board does not have a compelling justification for these actions. Thus the coercive nature of the Gaming Option violates the

standard laid out in Blasius Industries, Inc. v. Atlas Corp.

Statement of Facts

Praise Video Incorporated ("Praise Video") is a Delaware corporation formed in the mid-1970s. R. at 3. In September 2013, Praise Video reincorporated as a public benefit corporation. Id. In accordance with Delaware law, Praise Video's certificate of incorporation states its specific public benefit as "the promotion of the values articulated in the Confession of Faith in a Mennonite Perspective." Id. Praise Video's directors and a majority of the 250 stockholders are members of the Mennonite Church, or are related to Church members. R. at 4.

Praise Video began as a family business seeking to provide an alternative to violent and sexually inappropriate media through the production and sale of biblically themed entertainment. R. at 3-4. Recently, Praise Video expanded its product pool into Christian themed video games, most notably Arc of Justice®. R. at 4. Praise Video enjoys consistent financial success, averaging $4 million a year in recent years, with its gaming division attributing at least sixty percent of its overall earnings. Id. Jacob Bissinger ("Bissinger"), a twenty-two percent shareholder, has served as Praise Video's CEO from inception and sits on the board of directors. Id. The remaining Directors collectively own four percent. Id.

Delaware enacted public benefit corporation statutes in August 2013. Id. Thereafter, Old Praise Video merged into Praise Video to

become a public benefit corporation; each share of Old Praise Video stock was converted into the right to receive one share of Praise Video stock. R. at 4-5. Appellee Susan Beard, a three percent stock owner, dissented from the merger. R. at 5. Appellee Mercer Christian Publishing ("Mercer"), acquired two percent of Praise Video's shares after the reorganization. Id. Mercer is an indirect wholly-owned subsidiary of media conglomerate Mercer Media, Inc. ("Mercer Media"). Id. Mercer is known for best-selling Bibles, and audio and digital Christian faith-based content. Id. Mercer preserves an identity separate from Mercer Media and upholds an inspirational mission by promoting biblical values and honoring Jesus Christ. Id.

In 2013, Bissinger announced his decision to retire as CEO. R. at 6. In March, Bissinger decided to diversify his investments by selling his Praise Video shares. Id. The Board was informed of this decision and retained Norman Stoltzfus as a financial advisor to explore potential alternatives for the company's future, including transactions in which all stockholders would liquidate. Id. Stoltzfus identified a number of potential bidders, including Mercer, which was explicitly interested in expanding Praise Video's gaming division. R. at 7. Mercer sought to expand Praise Video's customer base through synergies with Mercer's publications and gaming operations. Id. Praise Video's Board met on June 24, 2013, where Stoltzfus reported on potential alternatives, including Mercer's proposal. Id.

The meeting soured when Bissinger inquired about how Mercer would achieve its predicted revenues. Id. Stoltzfus theorized considerable

market growth "might be anticipated" in the area of combat-oriented video games. Id. Bissinger and Defendant-director Metcalf vocalized that expansion into military-type games violated the Church doctrine to witness against all forms of violence. R. at 7-8. Thereafter, director Holbrook stated that it was legally inappropriate for the board to seek to dictate how Praise Video should be operated post-sale because the directors were solely obligated to achieve the best sale price available for the shareholders. R. at 8.

The Board instructed Stoltzfus to continue his efforts, and invoked Praise Video's legal counsel to report on the Board's legal obligations. Id. Counsel determined Holbrook was correct, but that the Board could alter its legal obligations by reorganizing as a public benefit corporation. Id. Subsequently, the Board voted to approve Praise Video's reorganization. Id. The reorganization plan was presented to the stockholders who were informed that the Board was engaged in the process of exploring strategic alternatives, including the sale of the company. Id. Stockholders were also informed that reorganization would allow directors greater flexibility in the sale of the company to consider Mennonite values, as well as maximizing financial wealth. R. at 9. Reorganization was given stockholder approval and became effective on September 30, 2013. Id.

Post-reorganization, Appellant Director Francis Pennock concluded that he could assemble a bid to rival Mercer's, while continuing to operate Praise Video in accordance with its traditional operations. Id. Thereafter, New Hope, a Delaware corporation, was formed to

acquire Praise Video. R. at 6, 9. Pennock both sits on Praise Video's Board and is a twenty percent shareholder in New Hope. Id. The remainder of New Hope's stock is owned by Miller Price L.P., a limited partnership with two principals, only one of whom is a Church member. Id. Praise New Hope, Inc. is New Hope's wholly-owned subsidiary formed to merge with Praise Video. Id. Pennock was the driving force behind the formation of New Hope and plans to serve as Praise Video's CEO following the Praise Video-Praise New Hope Merger. Id.

In November 2013, the board, with Pennock abstaining, approved the decision for potential bidders to submit their best proposals to acquire Praise Video. Id. Mercer submitted a bid of $50 per share; New Hope submitted a bid of $41 per share. Id. Neither agreed to include the public benefit provision from Praise Video's charter, both conditioned the bids with no-shop provisions and termination fees. R. at 9-10. New Hope further conditioned its bid on the grant of an option to acquire Praise Video's gaming division for $18 million, $12 million below its actual value, to be paid in five year installments if the New Hope bid was unsuccessful. R. at 10. New Hope knew it would be unlikely to outbid Mercer financially; it used the Gaming Option as insurance so a financially inferior bid would have a chance of success. Id. As consideration, New Hope promised Pennock would be Praise Video's CEO post-merger and, so long as he remained CEO, would operate the corporation in a manner consistent with Church values. Id.

The Praise Video board met December 9, 2013, for seven hours to discuss and respond to the bids. Id. The board reviewed the bidding

process, the anticipated impact of the Gaming Option and the prospects for further bids. R. at 10-11. The board concluded it was unlikely that any superior bids would develop. R. at 11. Bissinger again expressed concern about the possibility of Mercer expanding operations into combat oriented games post-merger. Id. Bissinger stated explicitly that regardless of Mercer's Christian orientation, the possibility of expansion into combat simulation was so intolerable he would not support such a merger regardless of Mercer's financially superior bid. R. at 11-12. The directors recognized that the $12 million undervaluation would encourage stockholders to vote in favor of the New Hope Merger, even if personally the stockholders would have wanted Mercer's higher offer. R. at 12. The directors, excluding Holbrook, favorably viewed the Gaming Option as it would ensure the consummation of the New Hope Merger. Id. Subsequently, the majority of directors, Pennock absenting, approved the New Hope bid. R. at 11.

Argument

It is the fundamental principle of corporate law that directors owe the "unyielding" fiduciary duties of due care and loyalty to the corporation and stockholders. Guth v. Loft, Inc., 5 A.2d 503, 510-11 (Del. 1939); Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985). The business judgment rule builds on this principle in presuming that in making business decisions the directors of a corporation acted "on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company." Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984). The presumption is rebutted, and

judicial inference is proper, when directors breach a fiduciary duty. Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993).

A court will subject directors' conduct to enhanced scrutiny where the reasonableness of directors' actions is questioned. See Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985). Enhanced scrutiny is proper in the adoption of defensive measures in response to a hostile takeover reasonably determined as a threat to the corporation. Unocal, 493 A.2d at 954-55. It is also proper in situations giving rise to Revlon duties: entrance into a transaction that will cause a change in control, initiation of an active bidding process seeking sale of the corporation, or when actions make the breakup of the corporation inevitable. Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34, 47 (Del. 1993); Revlon Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 178, 183 (Del. 1986).

The business judgment rule neither applies in the context of stockholder voting. Blasius Industries, Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988). Stockholders have "the fundamental right to vote" on corporate matters. Esopus Creek Value LP v. Hauf, 913 A.2d 593, 602 (Del. Ch. 2006). A stockholder vote will be nullified if the board has taken actions which cause the stockholders to vote in favor of the proposed transaction for reasons other than the transaction's merits. Williams v. Geier, 671 A.2d 1368, 1382 (Del. 1996). All the principles of Delaware corporate law apply equally to the newly recognized public benefit corporation. 8 Del. C. § 362. The public benefit corporation is a for-profit corporation intended to produce a

public benefit and to "operate in a responsible and sustainable manner." Id. at(a).

A preliminary injunction in appropriate where Plaintiffs can establish a reasonable probability of success on the merits; that immediate and irreparable harm will result if injunctive relief is denied; and that the harm to the Plaintiff if relief is denied exceeds the harm to the Defendant if the injunction is issued. Cantor Fitzgerald, L.P. v. Cantor, 724 A.2d 571, 579 (Del. Ch. 1998). Appellants in this action concede that if Appellees demonstrate a reasonable probability of success on the merits, a preliminary injunction would be appropriate in this instance. R. at 13.

I. APPELLEES ARE SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS BECAUSE THE PRAISE VIDEO DIRECTORS VIOLATED THE STATUTORILY IMPOSED BALANCING REQUIREMENT THROUGH MANAGERIAL DECISIONS THAT BREACHED THE FIDUCIARY OBLIGATIONS OWED TO THE SHAREHOLDERS AND CORPORATION.

A. Question Presented

Did the board of directors of Praise Video fail to conform to the balancing requirements of 8 Del. C. § 362(a) by favoring Praise Video's public benefit, and in doing so subsequently fail the fiduciary duty of loyalty and violate the principles of Revlon?

B. Scope of Review

The grant or denial of a preliminary injunction will be reviewed by the Court for abuse of discretion. S.I. Management L.P. v. Wininger, 707 A.2d 37, 40 (Del., 1998). In so doing, the Court gives no deference to the legal conclusions of the trial court. E.g. Kaiser

Aluminum Corp. v. Matheson, 681 A.2d 392, 394 (Del. 1996).

C. Merits of the Argument

Appellees are likely to succeed on the merits because the Praise Video directors blatantly failed to manage the corporation in a way that comported with the balancing requirements of § 362(a) and 365(a). Furthermore, in failing the balancing test, the board violated the fiduciary duty of loyalty by failing to remain disinterested and independent, and in breaching its Revlon duties by not attaining the best value for the stockholders in the sale of the company.

1. The Praise Video Directors Failed to Properly Balance the Factors Listed in 8 Del. C. § 362 (a) and 365 (a).

A public benefit corporation is a for-profit corporation intended to produce a public benefit and to operate in "a responsible and sustainable manner." 8 Del. C. § 362(a) (2013). A public benefit is a positive effect on persons, communities or interests, including effects of a charitable or religious nature. Id. §(b). Public benefit corporations are subject to all applicable provisions of Delaware corporate law. 8 Del. C. § 361 (2013). In particular, the board of a public benefit corporation must *manage* the business and affairs of the corporation in a manner that *balances* the pecuniary interest of its stockholders, the best interests of those materially affected by the conduct of the corporation, and the specific public benefit identified in the company's certificate of incorporation. Id. § 365(a).

A decision is not balanced if one element is dispositive. In the management of a public benefit corporation the board of directors must balance all three elements. Praise Video failed in this regard by

making decisions that placed substantial influence on the furtherance of the promotion of Mennonite values to the detriment of both the stockholders' pecuniary interests, and those materially affected by the corporation's conduct. Bissinger made it clear that his only worry in the context of the merger was staying true to Praise Video's public benefit: its Mennonite values. R. at 7-8, 11-12. In fact he stated that he would not accept Mercer's proposal regardless of the differences in Mercer and New Hope bids. R. at 11-12.

Furthermore, the directors agreed to approve the New Hope merger for $41 per share, a value substantially lower than Mercer's $50 bid. R. at 2. That decision in combination with the substantially undervalued Gaming Option shows the directors did not seek to balance the pecuniary interests of the shareholders in the slightest. The acceptance of this gross difference in price resulted from the board's decision that any violation of Church doctrine outweighed stockholder profits. This decision effectively robbed the shareholders of the fair value of their shares. Moreover, it shows that the public benefit espoused in Praise Video's certificate of incorporation was the sole determinant in the board's decision to approve the New Hope merger. As such, the decision of the board of directors included no balancing whatsoever. One interest clearly was dispositive. Accordingly, the board of Praise Video failed the statutorily imposed balancing test. The Court should therefore affirm the preliminary injunction issued by the Chancery Court.

2. The Praise Video Directors Violated the Fiduciary Duty of Loyalty by failing to remain disinterested and independent.

Directors must act in accordance with their fundamental and unyielding duty of loyalty. Unocal, 493 A.2d at 954-55. The duty of loyalty dictates that the best interests of the corporation and shareholders take precedence over interests possessed by the directors or officers of the corporation. Cede, 634 A.2d at 361. Loyalty requires directors to refrain from conduct which may "injure the corporation and its stockholders or deprive them of profit or advantage." Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1345-46 (Del 1987). Accordingly, directors must avoid any conflicts between self-interest and fiduciary duties. Guth, 5 A.2d at 510.

To fulfill the duty of loyalty, a director must be disinterested and independent. Cede, 634 A.2d at 362. A director is independent only when his decision is based entirely on the merits of the transaction without personal influences. Id. A director is self-interested when he receives a personal benefit from the transaction not received by the shareholders. Id. As such, interested directors may not be used to constitute the majority of a board vote. Italo-Petroleum Corp. of Am. v. Hannigan, 14 A.2d 401, 408 (Del. 1940). The business decisions of a board with interested directors can be cleansed through the use of a special committee comprised of outside, independent directors. Gesoff v. IIC Indus. Inc., 902 A.2d 1130, 1145 (Del. Ch. 2006).

The directors of Praise Video violated their fiduciary duty of loyalty by failing to remain disinterested and independent. Bissinger not only sits on the board of directors, but is a twenty-two percent

shareholder in the company and had been Praise Video’s sole CEO since its incorporation. R. at 4. While these facts alone would not lead to a breach of the duty of loyalty, the actions that resulted from Bissinger’s interest and attachment to Praise Video lead to a director vote filled that was self-dealing. Bissinger and Metcalf expressed views early on they would not support a merger with Mercer due to the possibility of Mercer developing combat-oriented video games. R. at 7. These views did not change but in fact grew in strength. During the December 9 board meeting to review the merger proposals, Bissinger stated that he could not support a merger with Mercer regardless of the difference in the Mercer and New Hope bids. R. at 11-12.

Both Bissinger and Metcalf failed to make decisions free from personal influence on the merits of the transaction and therefore failed to remain independent directors. Bissinger’s personal influence and vehement objection to the Mercer proposal invalidate his independence. Furthermore, Bissinger receives a benefit from his decision to the exclusion of the shareholders: his peace of mind. Bissinger made it be known that his personal interests in the corporation would not be tainted by even the possibility that the acquiring corporation would branch out into combat-oriented games post-merger. As such Bissinger let his personal influence and ties to Praise Video influence his fellow directors in their decision making. This lead to a board decision that was anything but disinterested.

The Praise Video board could have stayed true to their fiduciary obligations by implementing a special committee of outside directors.

Pennock abstained from voting in order to save himself from appearing on both sides of the transaction. R. at 12. While this action saves his conduct it should have been both a warning and example to the remaining directors to recuse themselves from voting due to personal influence and interest, or to form a special committee to make disinterested and independent decisions.

In allowing personal interest to saturate the directors' decision making process, the board violated its unyielding duty of loyalty to the corporation and stockholders. As such the board's decision is not subject to the business judgment rule. Accordingly, the Chancery Court's grant of a preliminary injunction should be affirmed.

3. The Praise Video Board Failed to Fulfill its Revlon Duties in a Sale of Control.

Management of the corporation is placed primarily within the control of its board of directors. 8 Del. C. § 141(a). As previously stated, directors owe the fiduciary duties of loyalty and due care to the corporation and the stockholders. Guth, 5 A.2d at 510. The directors' obligations to fulfill these duties do not end in the context of a corporate merger. Revlon, 506 A.2d at 179. However, certain actions by a board of directors in the context of a merger subject directors' conduct to enhanced scrutiny. QVC, 637 A.2d at 23.

In a merger, a board may choose to adopt certain defensive measures to preserve the corporate vision in response to what the board reasonably believes to be a threat to corporate control. Unocal, 493 A.2d at 954-55. These actions will not be held to violate the

board's fiduciary duties if the directors show that reasonable grounds for believing a danger to corporate policy and effectiveness existed. Id. at 955. The board will satisfy this burden by a showing of good faith and reasonable investigation. Id. Furthermore, the directors must show that the defensive measures taken were reasonable in relation to the threat posed to the corporation. Id.

When the actions of the directors no longer seek to protect the corporation but instead place it up for sale, the directors are no longer preservers of the corporation but instead auctioneers. Revlon, 506 A.2d at 182. In the sale of a company, when the dissolution or break-up of the corporation becomes inevitable, directors' primary responsibility becomes obtaining the highest price for the benefit of the stockholders. Id. Enhanced scrutiny will be applied to make sure that the directors have acted reasonably to get the best value available for the stockholders. QVC, 637 A.2d at 43.

Revlon duties have been consistently emphasized and confirmed by this Court. Malpiede v. Townson, 780 A.2d 1075, 1075 (Del. 2001) ("Board must perform its fiduciary duties in the service of s specific objective: maximizing the sale price of the enterprise."); QVC, 637 A.2d at 44 ("[D]irectors must focus on one primary objective—to secure the transaction offering the best value reasonably available for the stockholders...") Revlon, 506 A.2d at 182 ("The duty of the board ... [is] the maximization of the company's value at a sale for the stockholders' benefit."); See also Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1288 (Del. 1989); Barkan v. Amsted Indus., Inc.,

567 A.2d 1279, 1286 (Del. 1989).

Whether a board may seek to impose its corporate vision into merger negotiations with an acquiring company is a question answered by both Revlon and Paramount Communications, Inc. v. Time, Inc. See Revlon, 506 A.2d 173; see also Time, 571 A.2d 1140 (Del. 1989). At first glance it appears the Court in Time violated the fundamental holding of Revlon: in a sale of control the directors' final duty to the corporation is to achieve the highest price available to the stockholders. Revlon, 506 A.2d at 43-44. In Time, the board of directors negotiated a deal with Warner Brothers that would preserve a management committed to Time's "journalistic integrity." Time, 571 A.2d at 1144. The board approved the transaction over a merger with Paramount that would offer a substantially higher financial gain for Time's stockholders. Id. at 1148. Paramount sought an injunction of the Time-Warner merger claiming that the approval of the Time-Warner transaction violated the Time directors' Revlon duties. Id. at 1149-1150. However, the court upheld the Time-Warner transaction. Id.

Although it seems the board in Time put more emphasis on maintaining their corporate vision after the Time-Warner merger was completed and in doing so violated Revlon, it becomes clear that a corporation may negotiate its corporate vision into a merger transaction over a higher cash bid only when the target corporation does not make dissolution of the company inevitable. Id. at 1150. When a transaction does not result in a change of control, Revlon duties do not apply. OVC, 637 A.2d at 42. However, once the object is no longer

to protect or maintain the corporate enterprise, a board cannot extend a "dead-hand" into the future enterprises of the acquiring corporation. See Revlon, Inc., 506 A.2d at 182. Simply, the board may not allow any non-stockholder interests to interfere with achieving the highest price available. Mills Acquisition Co., 559 A.2d 1261, 1285(Del. 1989).

The board of directors of Praise Video failed to achieve the highest value reasonably available to the stockholders, blatantly violating the duties imposed under Revlon. Bissinger made the decision to retire as CEO and diversify his investments by liquidating his shares of the Praise Video outstanding stock. R. at 6. This action spurred the board to hire a financial advisor, Norman Stoltzfus, to shop the company in order to receive bids that would allow all Praise Video stockholders to liquidate their investments. Id. Mercer made its interest in acquiring Praise Video known early in the game, R. at 7, however, its interest was soon joined by that of New Hope, R. at 9. In November of 2013, Stoltzfus directed Mercer, New Hope and three other bidders to submit their best bids. R. at 9. This decision resulted in two bids: Mercer with a bid of $50, and New Hope with a bid of $41. Id. The directors entered into discussions in order to determine which of the two offers it would choose. R. at 10-11.

Praise Video made its intention to sell the company known early on. By the time the board called for bid proposals from Mercer and New Hope it was clear that the board's intention was to sell the company. This becomes stronger in light of the fact that Praise Video did not

want to enter into a stock for stock merger R. at 6. When Praise Video entertained the two proposals the breakup of the corporation was inevitable. However, in light of that knowledge, the Praise Video directors chose to accept New Hope's financially inferior offer. R. at 11. In so doing, the board failed to attain the highest value available for the stockholders by approving a merger that – after the financial ramifications of the Gaming Option – granted stockholders a substantially inferior price over a bid that offered $50 a share. R. at 9-10.

Praise Video directors' actions violate Revlon and its progeny further by seeking to maintain its corporate vision post-merger. It became clear early on that the board of directors, Bissinger and Metcalf in particular, were vehemently opposed to a merger with Mercer due to the potential of Mercer spreading out into the world of combat-oriented games post-merger. R. at 7-8. The views of Bissinger and Metcalf did not change. R. at 11. Bissinger stated at a board meeting that the possibility of Mercer expanding into combat-oriented games was unacceptable in light of Church doctrine. R. at 11-12. He furthermore stated that he would not support a merger with Mercer regardless of the differences in bid prices. R. at 12. Similarly, Praise Video made its acceptance of New Hope's bid contingent on the fact that Pennock would operate the company post-merger consistently with the values of the Church. R. at 10. Throughout the merger process, it was clear that the Praise Video directors were mandating the furtherance of their corporate vision, the public benefit, in derogation of decades of case law.

It is undisputed that the public benefit corporation law states that directors must manage a public benefit corporation through the balancing of the pecuniary interests of the stockholders, the best interests of those materially affected, and the corporation's public benefit. 8 Del. C. § 362(a). Appellants would claim that the statute allows directors of a public benefit corporation to place the corporation's public benefit into merger negotiations. As this is an issue of first impression in the court the merits of this argument must be analyzed through the lens of the applicable Delaware case law.

The Praise Video directors' conduct can be distinguished from that of the directors in Time. The Court held that the board in Time did not violate the principles of Revlon by failing to take the highest bid in deference to a transaction that furthered its corporate vision. By that stroke, it would seem that the Praise Video directors did not violate their Revlon duties by failing to take the highest cash offer. However, the fatal flaw in this logic is the failure to recognize that the corporation in Time was not being dissolved. Time was maintaining control in the transaction; therefore, the company was not disappearing. It is obvious in this case that the board's intention was not for Praise Video to survive the merger. It was a cash-out merger. The stockholders were to receive no stock in Praise New Hope, nor were they granted the option to choose to convert their Praise Video shares into shares of the new company. The transaction was formed with the intent that Praise Video would no longer exist. As such, the decision to place Praise Video on the chopping block charged the directors with getting the stockholders the best value for their

shares. A duty Praise Video blatantly failed to accomplish.

Once the directors decided to sell the corporation, its dissolution became inevitable and the directors could not properly act as the defenders of the corporate vision when in fact their role had changed to that of auctioneers. As such, the preliminary injunction granted by the Chancery Court should be affirmed.

II. APPELLEES ARE SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS BECAUSE THE PRAISE VIDEO DIRECTORS INTERFERED WITH THE STOCKHOLDERS' FREEDOM TO VOTE THEREBY COERCING THE VOTE.

A. Question Presented

Whether Praise Video directors' imposition of the Gaming Option effectively coerced stockholder voting by depriving stockholders of a full and fair opportunity to vote, and if so, whether Appellants have a compelling justification for such actions?

B. Scope of Review

The grant or denial of a preliminary injunction will be reviewed by the Court for abuse of discretion. S.I. Management L.P., 707 A.2d at 40. In so doing, the Court gives no deference to the legal conclusions of the trial court. E.g. Kaiser Aluminum Corp., 681 A.2d at 394.

C. Merits of Argument

Appellees are substantially likely to succeed on the merits because Praise Video's Board failed to afford the stockholders a full and fair vote through the approval of the coercive Gaming Option. Thus, Appellants' conduct should be reviewed under Blasius.

1. The Praise Video Directors' Actions Were Taken for the Primary Purpose of Thwarting Stockholder Voting in Favor of the New Hope Proposal.

A board of director's decision to enter into and recommend a merger can only become final after ownership action is taken by a stockholder vote. Omnicare Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 930 (Del. 2003). Heightened scrutiny must be applied where a board's actions have the "primary purpose of interfering with the effectiveness of a stockholder vote." Id. at 659. In matters involving issues of corporate control, in which the directors submit proposals to a stockholder vote, Delaware courts remain vigilant to ensure that the directors' control of the voting process allows stockholders a full and fair opportunity to vote. In re the MONY Group, Inc. Shareholder Lit., 853 A.2d 661, 672-673 (Del. 2004).

In Blasius, the Court noted "action designed principally to interfere with the effectiveness of a vote inevitably involves a conflict between the board and a shareholder majority." Blasius, 564 A.2d at 660. Such action is viewed by the court as impermissible coercion. Id. Wrongful coercion of stockholder voting may exist where the board or some other party "takes actions which have the effect of causing the stockholders to vote in favor of [a] proposed transaction for some reason other than the merits of that transaction." Williams v. Geier, 671 A.2d 1368, 1382-83 (Del. 1996). In other words, if a transaction is "crammed down" on shareholders in such a way as to take away their freedom to vote, the measure is coercive. Air Products and

Chemicals, Inc. v. Airgas Inc., 16 A.3d 48, 113 (Del. Ch. 2011). The determination of whether a particular stockholder vote has been robbed of its effectiveness due to coercion depends on the facts of each case. Williams, 671 A.2d at 1382.

As provided in Section 251(c) and Section 361 of the Delaware General Corporate Law, nothing in the public benefit corporation statute purports to override the stockholders' entitlement to an effective vote on a merger. 8 Del. C. §251(c), 8 Del. C. §361. Public benefit corporations remain subject to the generally applicable provisions of Delaware corporate law, which include a right to a full and fair vote on mergers, free from preclusion or coercion. Id.

The Gaming Option is a tactic by New Hope to ensure a favorable vote of its proposal over Mercer's. The approval of the Gaming Option by Praise Video's board effectively deprived stockholders' votes of any voluntary quality. It therefore thwarted the votes for a merger that is not based purely on its merits. In other words, the December 9 vote on the Merger was coerced as it effectively forced stockholders to vote for the $41 deal with New Hope because no deal with Mercer was possible if the Gaming Option was effective. It is therefore undoubtedly clear that Appellants deliberately employed strategies that frustrated the shareholders' vote.

Praise Video's directors intended to affect the stockholder vote on December 9, in particular, to promote the accomplishment of the Merger with New Hope, over one with Mercer. R. at 10-11. The record speaks for itself when it notes that Praise Video's directors recognized that the Gaming Option and its acknowledged undervaluation

would likely encourage many Praise Video stockholders to vote in favor of the Merger, even if they individually would have preferred Mercer's higher cash bid. R. at 11-12. Acknowledging their own ill intention, it cannot be contested that Appellants' conduct leading up to the Merger vote, and actions specifically at the December 9 meeting, were taken with the primary purpose of interfering with the stockholder vote. The stockholders effectively had no choice as the directors' actions deprived the shareholders of any voluntary vote. The safeguard to vote freely was quashed by the directors' approval of the Gaming Option. Therefore, the directors failed the first arm of Blasius scrutiny.

2. The Praise Video directors, Regardless of Good Faith Belief, Have Coerced Stockholder Voting in Favor of New Hope's Merger Proposal Absent Compelling Justification.

Appellants admit that their actions at the December 9 board meeting were intended to persuade the stockholder vote in favor of the Merger with New Hope. If there is a contention that a board acted for the purpose of "thwarting a shareholder vote," the board must show a compelling justification for its action. Blasius, 564 A.2d at 659, 661. To overcome this burden, directors must show strong justification for interfering with the stockholder vote. Id. Compelling justification has not been met if the board merely purports that it knows what is in the best interest of the corporation. Id. at 663. Therefore, not even with a good faith purpose may directors intentionally deprive stockholders of their right to vote on a merger. Id. at 664.

The Praise Video directors have failed to provide any evidence of a compelling justification for purposefully thwarting the stockholders' votes in favor of the New Hope Merger. Appellants do not offer a single compelling justification for favoring the New Hope Merger over Mercer's higher cash offer. In fact, the directors' only potential justification for its conduct is that the Merger, in the directors' eyes, was more advantageous to the company's future and promotion of its public benefit. The board will likely contend that its conduct is justified due to the belief that Mercer, over New Hope, would potentially stray the company's operations from its stated public benefit of promoting religious values. However, there is no evidence in the record to compel such a belief.

Mercer, just as with New Hope, is in the business of promoting religious values. R. at 5-6. In fact, its stated mission is to "spread inspiration by developing and distributing content that promotes biblical values and honors Jesus Christ." R. at 5. The only basis for Praise Video's assumptions about what Mercer would do with the company post-merger stem only from a report made by Norman Stoltzfus; a financial advisor retained by the board at the June 24, 2013 board meeting. R. at 7. Stoltzfus was asked about the practicality of Mercer achieving the synergies and enhanced revenues it had predicted. Id. In response Stoltzfus indicated that considerable market growth might be anticipated in the area of combat-oriented video games. Id. Absent that report, the board had no basis for believing the information would substantiate. Furthermore, neither New Hope nor Mercer agreed that the company's post-merger certificate of incorporation would

include the public benefit provision in Praise Video's existing charter. R. at 9. In fact, absent the addition of the Gaming Option on New Hope's end, the Mercer bid was substantially superior to New Hope's. This evidences that without the inclusion of the Gaming Option, and without the board's persuasive comments about the threat to the company's religious objectives, the stockholders may have been inclined to favor Mercer's proposal.

The board of Praise Video may have intended to act with the utmost good faith and in the genuine belief that New Hope's Gaming Option would promote their public benefit more accurately than Mercer; however, the directors cannot intentionally deprive their stockholders of the statutorily-mandated right to vote fully and fairly on the merger of their choice. This hindrance of a stockholder's right to vote fully and fairly of his or her own choosing cannot be justified by a good faith belief on the part of the board of directors, and therefore constitutes a violation of the duty of loyalty that the Praise Video's board owed to its stockholders. Thus, as Appellants' primary purpose was to thwart stockholder voting, and such was done without any compelling justification. Both requirements of the Blasius standard are satisfied, and preliminary injunction was proper.

Conclusion

For the foregoing reasons, Appellees respectfully request this court uphold the preliminary injunction granted by the Chancery Court.