IN THE SUPREME COURT OF
THE STATE OF DELAWARE

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<tr><td>PRAISE VIDEO, INC., a Delaware corporation, JASON BISSINGER, FRANCIS PENNOCK, MARK VAN ZANDT, HOWARD METCALF, PETER HORNBERGER, NEW HOPE PUBLISHING CO., and PRAISE NEW HOPE CORP.,

Defendants Below,
Appellants

v.

MERCER CHRISTIAN PUBLISHING CO. and SUSAN BEARD,

Plaintiff Below,
Appellee.</td><td>)
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Court Below:
Court of the Chancery of the State of Delaware in and for New Castle County

Civil Action No. 8974-CD</td></tr>
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APPELLANT'S OPENING BRIEF

Filed by Team K
Attorneys for Appellants

February 7, 2014

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NATURE OF PROCEEDINGS

This is an appeal from the Court of Chancery's Memorandum Opinion ("Op.") submitted on January 14, 2014. The present action was commenced in the Court of Chancery on December 13, 2013 by Plaintiffs, Mercer Christian Publishing Co. ("Mercer") and Susan Beard, a Praise Video stockholder (collectively "Plaintiffs"), against Defendants: (1) Praise Video, Inc. ("Praise Video"); (2) New Hope Publishing Co. ("New Hope"); (3) Praise New Hope Corp., a wholly-owned subsidiary of New Hope; and (4) Praise Video directors Jacob Bissinger ("Bissinger"), Mark Van Zandt, Howard Metcalf ("Metcalf"), Peter Hornberger, and Francis Pennock ("Pennock").

On December 13, 2013, Mercer moved for a preliminary injunction to prevent the consummation of a merger between Praise Video and Praise New Hope Corp. ("the Merger"). (Op. 12). Mercer alleged that the directors, including the named defendants and Samuel Holbrook ("the Directors"), breached their fiduciary duties by approving the Merger. (Op. 2, 12). This agreement, under which Praise Video's shares would be converted into the right to receive $41 per share in cash, precluded Mercer from acquiring Praise Video for $50 a share. (Op. 2). The Merger also included an option to acquire Praise Video's core profitable line of gaming products ("the Gaming Option") for $18 million, a price the Directors acknowledge is about 40% below its true value. (Op. 2, 10). According to Mercer, the Directors approved the Merger based solely on their belief that New Hope would be more faithful to the religious principles embodied in Praise Video's express corporate mission as a public benefit corporation ("PBC").

(Op. 2). Mercer emphasized the Directors' overarching duty to maximize stockholder value in a change-in-control transaction and dismissed the Directors' consideration of Praise Video's specific public benefit. (Op. 13, 15). It also claimed, in the alternative, that the Gaming Option forces all Praise Video stockholders to approve the Merger, thereby depriving the stockholders of their statutory right to cast a voluntary vote. (Op. 15).

On January 15, 2014, Chancellor Devellin granted Mercer's motion for a preliminary injunction. As a result, the Directors are enjoined from any action to effectuate, enforce, or consummate any term or provision of the Merger. Praise Video also deferred taking a stockholder vote on the Merger until as late as March 31, 2014, to permit this Court to reach a final decision. (Op. 12).

Pursuant to Supreme Court Rule 42, Praise Video appealed the order on January 22, 2014, which was granted on January 23, 2014.

SUMMARY OF ARGUMENT

I. The Court of Chancery incorrectly granted Mercer's motion for a preliminary injunction. Mercer does not have a reasonable probability of success on the merits. First, *Revlon*'s enhanced scrutiny should not apply in the context of PBCs; instead, the business judgment rule is the appropriate standard. If price is the sole deciding factor in every transaction, directors will forever be barred from balancing the other factors mandated by the Delaware PBC statutes, thereby eviscerating the need for the statutes entirely. Furthermore, even if this Court applies enhanced scrutiny, the Directors fulfilled their fiduciary duties because the Merger provided the highest "value." "Value" encompasses more than price per share in the PBC context; rather, it must appropriately balance both financial and public benefit concerns. This balance favors a bid that takes into account both a profitable price and Praise Video's specific public benefit.

II. Mercer also fails to show that the Gaming Option prevents an effective vote by the stockholders. The Court of Chancery relied on *Blasius*, an extreme case easily distinguishable from the one at hand. Furthermore, even if *Blasius* applies, the inherent structure of PBCs satisfies the "compelling justification" requirement for the Directors' approval of the Gaming Option. The business judgment rule is the appropriate standard, even under *Omnicare*, because the Directors satisfied their fiduciary duties. The Gaming Option merely encouraged stockholders to vote for the Merger; it created no requirement for them to do so. Therefore, Mercer's voting coercion argument fails, and this Court should deny injunctive relief.

STATEMENT OF FACTS

Praise Video is a Delaware PBC headquartered in Lancaster, Pennsylvania. (Op. 3). The corporation began in the mid-1970s as a small, family-owned business ("Old Praise Video") engaged in the production and distribution of digital entertainment of a wholesome, biblical nature. (Op. 4). Beginning in 2003, Old Praise Video expanded its product line to include video games with Christian themes. *Id.* The corporation has enjoyed modest, consistent financial success, with recent years' earnings averaging around $4 million. *Id.*

On August 1, 2013, Delaware adopted several significant statutory amendments that permit the formation of PBCs. (Op. 2–3). PBCs are required to identify in their charter "one or more public benefits to be promoted by the corporation." (Op. 3). The statutes also require PBC directors to base their fiduciary decisions on a unique balancing test that includes both financial and public benefit concerns. (Op. 11). Following the passage of these statutes, Old Praise Video merged into Praise Video, a PBC, on September 30, 2013. (Op. 4, 9). As required, over 90% of Old Praise Video's outstanding shares were voted in favor of the merger. (Op. 5). Praise Video identifies its corporate mission as the achievement of "a positive effect of a religious nature" through "the promotion of the values articulated in the Confession of the Faith in a Mennonite Perspective." (Op. 3).

Several months prior to the PBC merger, Praise Video CEO Bissinger decided to retire and, to this end, sought to diversify his investments. (Op. 6). After careful thought, he elected to sell his 22% stake in Praise Video and informed the rest of the Directors of this decision in March of 2013. *Id.* Consequently, the Directors hired Norman Stoltzfus ("Stoltzfus") as a financial advisor to explore transactions in which Praise Video's other stockholders could liquidate their investment. (Op. 6).

One potential bidder was Mercer, an indirect, wholly-owned subsidiary of Mercer Media, Inc. ("Mercer Media") headquartered in Coral Gables, Florida. (Op. 5). Although Mercer is known for various products encapsulating Christian faith-based content, its interest in Praise Video stemmed from its desire to expand Praise Video's gaming division. (Op. 7). Specifically, Mercer intended to exploit market growth in the area of combat-oriented video games, a fact that provoked considerable consternation among the Directors at their June 24, 2013 board meeting. *Id.* Although Mercer suggested an acquisition price "north of $40" per share, Bissinger and Metcalf felt that expansion into military-type games violated the corporation's religious commitment to condemning all forms of violence. (Op. 7–8). Holbrook, on the other hand, felt that the Directors should focus solely on achieving the highest sale price possible. (Op. 8).

Stoltzfus' subsequent assessment of the Directors' legal obligations in connection with a possible sale prompted Praise Video to reorganize as a PBC under Delaware's newly adopted statutes. (Op. 9). As a result, Pennock and Isaac Miller formed New Hope, a Delaware corporation, and expressed an interest in submitting a bid to acquire Praise Video. *Id.* This opportunity arose when, in mid-November 2013, Stoltzfus directed Mercer, New Hope, and three other potential bidders to submit their best bids by December 5, 2013. *Id.* Only Mercer and New

Hope submitted bids, of $50 per share and $41 per share, respectively. *Id.* Although both bids were fully financed, conditioned on stockholder approval, and excluded the public benefit provision in Praise Video's existing charter, they differed in one very material aspect: New Hope's bid, unlike Mercer's, included the Gaming Option. (Op. 9–10). This ensured both a profitable price for stockholders and an assurance from Pennock that, as future CEO of Praise New Hope, he would maintain corporate operations in a manner consistent with Mennonite values. (Op. 10). The Gaming Option is exercisable only if the Merger fails to gain stockholder approval and Praise Video is sold to another bidder within 12 months. (Op. 10, n.12).

On December 9, 2013, the Directors met to discuss the merits of both the Mercer and New Hope bids. *Id.* After agreeing on the improbability of any superior bids, Bissinger and a majority of the Directors revisited their concerns regarding Mercer's future plans for combat-oriented video games. (Op. 11). These concerns, coupled with their misgivings about Mercer being subject to the ultimate control of a secular, multinational media conglomerate, resulted in a 4–1 vote of (with Pennock abstaining) in favor of the New Hope bid. *Id.* The Directors, with the exception of Holbrook, felt that this bid struck the best overall balance between the stockholders' pecuniary interests, the interests of other stakeholders, and the specific public benefit identified in its certificate of incorporation. *Id.*

The official announcement of the Merger occurred shortly thereafter, and, in response, Mercer filed this lawsuit on December 13, 2013.

ARGUMENT

I. This Court should reverse the Court of Chancery and deny Plaintiffs' request for a preliminary injunction because the Directors fulfilled their fiduciary duties under PBC law in approving the Merger.

A. Question Presented

Do Delaware PBC directors violate their fiduciary duties by accepting a merger proposal with a lower share price when that merger better balances the PBC's relevant interests under Delaware law?

B. Scope of Review

The Court of Chancery's legal conclusions underlying its ruling on a preliminary injunction are subject to *de novo* review by this Court. *SI Management L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998).

C. Merits of the Argument

1. This Court should apply the deferential business judgment rule, rather than *Revlon*'s enhanced scrutiny, and find that the Directors fulfilled their fiduciary duties.

Praise Video is a PBC, and thus Delaware law explicitly requires the Directors to balance stockholders' pecuniary interests, other stakeholders' interests, and its specific public benefit when taking action. Because *Revlon*'s enhanced scrutiny requires that directors focus only on the highest share price during the sale of a regular corporation, it is inconsistent with the plain language of Delaware's PBC law. Accordingly, the Directors' decision to approve the Merger is entitled to the protection of the business judgment rule. Plaintiffs failed to show that the Directors breached their fiduciary duties, and thus this Court should deny injunctive relief.

i. Praise Video is a Delaware PBC, and therefore the Directors <u>must</u> balance stockholders' pecuniary interests, the interests of other stakeholders, and its specific public benefit purpose when making decisions.

This is the first opportunity for this Court to establish the appropriate standard of review for the actions of a PBC's directors. Under Delaware's PBC law, a for-profit corporation may become a PBC with 90% stockholder approval. DEL. CODE ANN. tit. 8, § 363(a)(2) (West 2013). PBCs are defined as "for-profit corporation[s] . . . intended to produce a public benefit . . . and to operate in a responsible and sustainable manner." § 362(a). Accordingly, a PBC must specify at least one public benefit in its charter. § 362(a)(1). "Public benefit" is further defined as "a positive effect . . . on 1 or more categories of persons, entities, communities or interests," and may include "religious" effects. § 362(b).

PBCs, like regular corporations, are subject to the management of a board of directors. §§ 141(a), 365(a). All directors of Delaware corporations owe fiduciary duties of care and loyalty to the corporation and its stockholders, duties extending to the approval of a merger. *Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985); *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984). However, unlike regular corporations, PBC directors must consider interests beyond stockholders when acting. § 365(a). Specifically, they must balance three factors: (1) the pecuniary interests of the stockholders; (2) the best interests of those materially affected by the corporation's conduct ("other stakeholders"); and (3) the corporation's specific public benefit. *Id.* As such, the Directors must consider more than just pecuniary interests in the Merger.

Analysis of the Merger must be conducted against the backdrop of Praise Video's status as a PBC. Praise Video's stated public benefit, the promotion of Mennonite values, aligns with its history and special relationship with the Church. (Op. 3–4). Because of this public benefit, the Directors were statutorily obligated to consider more than pecuniary interests in approving the Merger. § 365(a). Despite this court's vast jurisprudence in mergers and acquisitions, this is the first case to examine the impact of the statutory mandate that PBC directors consider constituencies other than stockholders. With that in mind, the Merger should be protected under the business judgment rule because to do otherwise would utterly frustrate the entire purpose of enacting Delaware's PBC law.

ii. This Court should not apply *Revlon*'s enhanced scrutiny because it would require PBCs to act only for the pecuniary interests of stockholders and in violation of PBC statutory law.

Delaware PBC law, by its very language, places the Merger at odds with this Court's traditional view of corporate mergers under the enhanced scrutiny standard. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986). Because applying *Revlon* to a PBC merger would defeat the very purpose of Delaware PBC law, this Court should not apply enhanced scrutiny to the Merger.

Three standards of review may apply to challenged board actions: (1) the default business judgment rule; (2) enhanced scrutiny; or (3) entire fairness. *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1371 (Del. 1995). Enhanced scrutiny is traditionally applied to a change-in-control transaction. *Revlon*, 506 A.2d at 182. While this standard is more stringent than the business judgment rule, "*Revlon* expounded a core element of Delaware corporate law, namely the fiduciary duties of directors." *Consolidated Forest Products Co. v. BTRta Forest Products, Inc.*, C.A. No. 3943-CJ, 15 (Del. Ch. Jan. 26, 2012). This Court has identified "only one *Revlon* duty—to [get] the best price for the stockholders at a sale of the company." *Lyondell Chemical Co. v. Ryan*, 970 A.2d 235, 242 (Del. 2009) (internal quotations omitted).

If *Revlon* requires directors to focus solely on obtaining the highest sale price—and there is ample support to suggest as much—it cannot apply to the sale of a PBC. *Malpiede v. Townson*, 780 A.2d 1075, 1083-84 (Del. 2001). In *Revlon*, this Court rejected concern for interests beyond stockholders as "inappropriate" when the corporation is for sale. 506 A.2d at 182. Such reasoning is inapplicable to PBCs because Delaware law requires PBC directors to balance stockholders' pecuniary interests with the corporation's specific public benefit and other stakeholders' interests. § 365(a). If this Court were to extend *Revlon* to PBCs and require directors to always succumb to the highest bidder, it would undermine the statutory purpose of PBCs.

Revlon is also factually distinguishable from the Merger, thereby warranting a different result. Unlike Praise Video's Directors, *Revlon*'s directors had no affirmative statutory obligation to consider interests other than those of stockholders. Thus, they violated their fiduciary duties by prioritizing the corporation's noteholders over its stockholders. *Revlon*, 506 A.2d at 182. They further favored one bidder over another by intentionally withholding information from the disfavored bidder. *Id.* at 184.

The absence of these facts from the case at hand and the legal implications of applying *Revlon* to PBCs should result in the rejection of enhanced scrutiny. Here, the Directors are obligated—by statute, no less—to consider more than stockholders' pecuniary interests in the sale of Praise Video. Furthermore, applying *Revlon* could go so far as to force directors to act directly <u>against</u> the specific public benefit of a PBC. For example, if Mercer had bid $60 while indicating it would publish content denouncing Christianity, strict adhere to *Revlon* would require the Directors to accept the bid. This would make a mockery of PBC law less than a year after its enactment and "undermine much of the justification for the establishment of [PBCs]." (Op. 14). Enhanced scrutiny is, therefore, an inappropriate—if not impossible—standard to apply to PBCs.

iii. The Directors' decision to approve the Merger was made in accordance with their fiduciary duties under the deferential business judgment rule.

The Directors' decision to approve the Merger as providing the best value to stockholders should be honored under the business judgment rule. This rule is a presumption "that in making a business decision 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*, 473 A.2d at 812. This presumption may be rebutted if the plaintiff can show breaches of fiduciary duties by individual directors or that a majority of directors were self-interested. *Orman v. Cullman*, 794 A.2d 5, 23 (Del.

2002). However, courts will not substitute their judgment for that of informed directors if the action can be attributed to a "rational business purpose." *In re Walt Disney Co. Derivative Litigation*, 906 A.2d 27, 74 (Del. 2006).

Here, Plaintiffs have failed to plead facts alleging the Directors breached their fiduciary duties. There are no allegations of self-dealing, and the only interested director abstained from voting on the Merger. (Op. 11). Similarly, Plaintiffs have not raised any argument that the Directors violated their duty of care. The Directors actively sought bidders for Praise Video, and all parties acknowledge there was "nothing material" lacking in the Directors' thorough approach to a potential merger. (Op. 10). The Directors appropriately balanced stockholders' pecuniary interests with those of other stakeholders and Praise Video's specific public benefit. Accordingly, the Merger had a rational business purpose related to the best interests of Praise Video. Because the Directors fulfilled their fiduciary duties under the business judgment rule, this Court should deny Plaintiffs' request for injunctive relief.

2. Even if the Directors' actions are subject to *Revlon*'s enhanced scrutiny, the Directors fulfilled their fiduciary duties because the Merger provided the highest value to the Praise Video stockholders.

Despite the factual and legal dissimilarities between *Revlon* and this case, the Merger is still valid even under enhanced judicial scrutiny. If Delaware PBC law is to have any meaning in the merger context, directors cannot be charged with only achieving the highest price in selling the corporation. Rather, this Court should instead read *Revlon* to require that PBC directors seek the highest <u>value</u> for stockholders. *Paramount Communications, Inc. v. QVC Network*, 637 A.2d 34, 44 (Del. 1993). In doing so, the Court should define "value" in the PBC context to mean the bid that best balances the interests of the corporation as mandated by Delaware PBC law. § 365(a). The Court should reverse the Court of Chancery because the Directors achieved the highest value for stockholders by selecting a merger that best balanced the pertinent interests of Praise Video as a PBC.

i. *Revlon* requires that directors maximize stockholder "value," a term that must be interpreted in the PBC context to mean the best balance of the relevant interests under Delaware law.

This Court has referred to *Revlon* as reinforcing directors' requirement to act in accordance with their fiduciary duties of care and loyalty, particularly when initiating the sale of a corporation. *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1989). This stems from "the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders." *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985). Therefore, directors must focus on securing "the transaction offering the best value reasonably available." *QVC*, 637 A.2d at 44. In calculating value, directors may consider more than the price offered by a potential bidder:

> [T]he board may assess a variety of practical considerations relating to each alternative including: fairness and feasibility; . . . the bidder's identity, prior background and other business venture experiences; and the bidder's business plans for the corporation and their effects on stockholder interests.

Id. (quoting *Macmillan*, 559 A.2d at 1282 n.29).

Delaware also adheres to the widespread maxim that statutes must be construed "in a way that gives effect to all of their provisions." *Chase Alexa, LLC v. Kent County Levy Court*, 991 A.2d 1148, 1152 (Del. 2010). To that end, the only opportunity for this Court to apply *Revlon* to Delaware PBCs without undermining the statutes is to define "value" as the best balance of the interests listed in § 365(a). Otherwise, *Revlon*'s highest-price holding would render most of the PBC statutes meaningless and effectively force directors to violate Delaware law when pursuing the sale of a PBC. Because this Court has yet to issue a decision relating to PBCs, it should take this opportunity to establish a relationship between PBCs and Delaware's existing merger and acquisition jurisprudence. The Court need not redefine value for all mergers, but could instead do so for PBCs to ensure "value" properly encapsulates <u>all</u> of the interests in § 365(a).

Under this modified application of *Revlon*, the Directors' decision to approve the Merger would still be subject to the stricter enhanced scrutiny standard while giving the Directors the opportunity to demonstrate fulfillment of their fiduciary duties. This also takes into account the possibility that stockholders in a PBC either willingly bought its stock or took part in a 90%-approved vote to reorganize the corporation as a PBC. That choice reflects an understanding of the additional interests balanced by PBC directors and gives full weight to those interests. Because value must take on a new meaning in the PBC context, the Directors satisfied their fiduciary duties under *Revlon*'s enhanced scrutiny.

ii. The Directors satisfied their fiduciary duties under *Revlon* in approving the Merger because they properly balanced the interests as mandated by Delaware law.

The Directors satisfied their burden under *Revlon* to show fulfillment of their fiduciary duties in approving the Merger. Enhanced scrutiny shifts the burden to directors to demonstrate their adherence to fiduciary duties before they enjoy the protection of the business judgment rule. *Unitrin*, 651 A.2d at 1373. When evaluating a merger under enhanced scrutiny, courts consider two key features: (1) the adequacy of the decision-making process of the directors; and (2) the reasonableness of the directors' actions given the circumstances. *QVC*, 637 A.2d at 45. These inquiries are applied to examine the ultimate goal of obtaining the best value for stockholders. *Id.* at 44.

However, this Court recently emphasized that "there is no single blueprint that a board must follow to fulfill its duties" under *Revlon*. *Barkan v. Amsted Industries, Inc.*, 567 A.2d 1279, 1286 (Del. 1989); *see also Lyondell*, 970 A.2d at 242. Instead, directors' decisions must be reasonable, rather than perfect. *QVC*, 637 A.2d at 45. In particular, the duty of good faith will be breached if directors fail to do all they should have under the circumstances. *Lyondell*, 970 A.2d at 243–44. Additionally, under Delaware law directors have no obligation to achieve the best result for minority stockholders at the expense of the majority. *In re Synthes, Inc. Shareholder Litigation*, 50 A.3d 1022, 1041–42 (Del. Ch. 2012).

Here, the Directors fulfilled their fiduciary duties in approving the Merger to obtain the best value for Praise Video as a PBC. First, the Directors took action to transition Praise Video from a regular corporation to a PBC. (Op. 5). In doing so, they fully informed stockholders of the impact of the transition and received greater than 90% approval. (Op. 8-9). Incidentally, all stockholders, including Plaintiffs, were entitled to an appraisal of the value of their shares, presumably to facilitate possible sale or repurchase. § 363(b). They chose not to do so. (Op. 5 n.8). Thus, the stockholders willingly approved the change in form to facilitate a merger that took into account more than simply financial gain.

With the blessing of the stockholders and PBC law's mandate to consider more than price, the Directors undertook numerous steps to receive the best value for Praise Video. As Plaintiffs admitted below, the Directors were fully informed when they approved the Merger. (Op. 10). The Court of Chancery concluded that Praise Video was thoroughly shopped, no additional bids were likely, and the Directors "acted with the utmost good faith." (Op. 11, 16). Given this meticulous process, the Directors approved the Merger because it produced the best value "in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by [Praise Video's] conduct, and the public benefit" of the corporation. (Op. 13).

The decision to sell Praise Video for a lower share price was reasonable because the Directors balanced the three statutory interests of Praise Video and found the Merger to offer the highest value. When a sale was first discussed, the Directors were pleased with the suggestion of a price over $40; thus, the Merger price of $41 clearly falls within a range the Directors found desirable. (Op. 7). Of similar importance, Pennock assured the Directors he would operate the new corporation in accordance with the values of the Church, thus fully advancing the specific public benefit of Praise Video. (Op. 10). This contrasts sharply with Mercer's bid, which potentially endangered Praise Video's commitment to the Mennonite Church. (Op. 7–8). Accordingly, the Directors appropriately chose the Merger as the most valuable option for Praise Video and its stockholders.

iii. Plaintiffs' arguments do not properly account for the recently enacted Delaware PBC statutes.

Plaintiffs offer three arguments disputing the reasonableness of the Merger: (1) Praise Video has no corporate interests in promoting religious values; (2) Praise Video has no proper interest in the business of the corporation after it is sold; and (3) religious concerns were solely dispositive as to the Merger. (Op. 14–15).

Plaintiffs' first argument can be easily disposed of because it contradicts the plain language of Delaware PBC law. The Delaware legislature explicitly included "religious" effects as a specific public benefit for a PBC. § 362(b). Plaintiffs and the Court of Chancery also agreed that the religious values promoted by Praise Video are properly identified as a "specific public benefit" under the statute. (Op. 3). Therefore, Plaintiffs' first argument is wholly without merit, and the Court should reject it outright.

Plaintiffs next assert that Praise Video has no interest in the corporation's business after its sale. (Op. 14–15). As the Court of Chancery noted, "accepting this argument could undermine much of the justification" for PBCs. (Op. 14). Directors must act in accordance with their fiduciary duties through the sale of a corporation; this requires PBC directors to continue to weigh the specific public benefit and other stakeholders' interests during a merger. *Van Gorkom*, 488 A.2d at 873. Furthermore, as the Court of Chancery suggested, the highest price for stockholders is not equivalent to the highest value. PBC stockholders may accept less monetary value "in exchange for what they perceive as a greater contribution toward fulfillment of the company's stated public benefit." (Op. 14).

Finally, Plaintiffs posit that no balancing was undertaken at all, and the Directors used only religious concerns in making their decision. (Op. 15). Bissinger's assertion that he would not support the Mercer bid does not imply that religion was the only concern. (Op. 11–12). Rather, it evidences a belief that the combination of the share price and the positive religious impact of the Merger was sufficient to outweigh Mercer's higher bid, particularly with its potential for a drastic deviation from Praise Video's specific public benefit. Indeed, Bissinger's statement suggests he would not have supported Mercer's bid even if it had been the only one on the table. (Op. 12). Plaintiffs' attempt to re-characterize the Merger ignores the thorough process undertaken by the Directors in seeking the most valuable proposal for Praise Video. Even more so, it ignores the irony inherent in arguing that the Directors took into account only one consideration (religion), when Plaintiffs would ask this Court to require the Directors do the same with another (share price).

Because the Directors undertook an adequate process in approving the Merger, and because the decision was reasonable in light of Delaware PBC law, this Court should deny injunctive relief.

II. **This Court should deny Plaintiffs' request for a preliminary injunction because the Directors did not violate their fiduciary duties in approving the Gaming Option.**

A. Question Presented

Do directors violate their fiduciary duties in approving a mechanism which is intended to influence a stockholder vote but does not disenfranchise the stockholders or preclude the vote?

B. Scope of Review

As in Part I, this Court exercises *de novo* review of the Court of Chancery's legal conclusions underlying its preliminary injunction. ruling. *SI Management L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998).

C. Merits of the Argument

1. **The Court of Chancery improperly relied on *Blasius* to grant the preliminary injunction; regardless, the Directors did not violate their fiduciary duties in approving the Gaming Option.**

In granting Plaintiffs' request for a preliminary injunction, the Court of Chancery incorrectly applied *Blasius*, as it is distinguishable from the case at hand. Even if *Blasius* does apply, the distinct nature of PBCs provides a compelling justification for the Gaming Option. Therefore, this Court should deny injunctive relief.

i. ***Blasius* applies to a distinct set of circumstances not present in this case, and the Court of Chancery should have applied the business judgment rule.**

Blasius, and its required "compelling justification," should not apply to the irreconcilable circumstances here. *Blasius Industries, Inc. v. Atlas Corp.*, 564 A.2d 651, 661 (Del. Ch. 1988). The burden of demonstrating a compelling justification for action arises where a board acts with the purpose of impeding "the exercise of stockholder voting power." *Id. Blasius* involved actions taken by the Atlas board to impede the appointment of new directors by a majority of the stockholders. *Id.* at 655. This precluded the majority from pushing for a leveraged recapitalization or sale of Atlas. *Id.* at 653–54.

The Court of Chancery found that the Atlas board acted with "the sole or primary purpose of thwarting a shareholder vote." *Id.* at 662. The directors' actions, while in good faith, "constituted an unintended violation of the duty of loyalty" to the stockholders. *Id.* at 663. While the Court of Chancery declined to adopt a *per se* rule invalidating board action taken to predetermine a stockholder vote, it required a "compelling justification" for the action. *Id.* at 661.

Blasius places a heavy burden on directors to justify their actions in very unique, rare circumstances. Indeed, it has already been distinguished from common defensive mechanisms like "poison pill[s]". *Yucaipa American Alliance Fund II, L.P. v. Riggio*, 1 A.3d 310, 331 (Del. Ch. 2010), *aff'd*, 15 A.3d 218 (Del. 2011). When a board adopts defensive measures to protect a merger, the measures must "withstand enhanced judicial scrutiny under the *Unocal* standard of review." *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 931 (Del. 2003). *Yucaipa* expressed the extremely limited nature of *Blasius*, limiting its application to situations where stockholders are truly disenfranchised by directors. 1 A.3d at 331. If some form of enhanced scrutiny does not apply, this Court typically defaults to the business judgment. *In re Walt Disney*, 906 A.2d at 74.

The case at hand is easily distinguishable because, unlike the board actions in *Blasius*, the Gaming Option approved by the Directors does not interfere with a stockholder vote. (Op. 10). The Gaming

Option did not prevent a vote on the Merger or predetermine its outcome; rather, it was an attempt to convince stockholders to vote for the merger best suited to Praise Video's status as a PBC. *Id.* The *Blasius* standard is limited to situations where directors either disenfranchise or preclude the stockholders from voting. As neither occurred here, *Blasius* does not apply, and the Directors' actions should be analyzed instead under the business judgment rule. Because the Directors' approval of the Gaming Option can be attributed to the "rational business purpose" of furthering Praise Video's specific public benefit, their actions should not be disturbed.

ii. Even if the *Blasius* standard applies, the nature of PBCs provides a compelling justification for the approval of the Gaming Option.

Should this Court choose to apply *Blasius*, the nature of PBCs provides a compelling justification for the Directors' approval of the Gaming Option. To satisfy the test from *Blasius*, directors must demonstrate a compelling justification for their actions, such that they did not violate a fiduciary duty owed to stockholders. 564 A.2d at 661–63. Here, Plaintiffs have failed to show that the Directors violated their duties to Praise Video as a PBC.

PBCs are, by statute, fundamentally different from traditional corporations. § 362(a). Directors must balance three factors, including the PBC's specific public benefit. § 365(a). The Directors approved the Gaming Option to prevent Praise Video from expanding into the realm of violent video games, an expansion in direct conflict with its specific public benefit. § 362(a); (Op. 11). The concern over the looming violation of Praise Video's specific public benefit represented a compelling justification for the Gaming Option.

Indeed, if this reasoning does not constitute a compelling justification, a PBC is powerless to stop takeovers violating its specific public benefit. This result frustrates the very purpose of the PBC statutes. The Directors' intent to protect Praise Video from violating its specific public benefit constituted a compelling justification for approving the Gaming Option. Therefore, the Court of Chancery abused its discretion, and this Court should deny Plaintiffs' request for injunctive relief.

2. Even in light of *Omnicare*, the Directors still fulfilled their fiduciary duties in approving the Gaming Option.

The Court of Chancery implicated the enhanced scrutiny of *Omnicare* when it applied *Blasius* to the Directors' approval of the Gaming Option. *Omnicare*, 818 A.2d at 928. However, like *Blasius*, *Omnicare* presented a unique set of circumstances, and thus its enhanced scrutiny standard does not apply. Even if this Court chooses to apply the enhanced scrutiny test enumerated in *Omnicare*, the Directors' approval of the Gaming Option satisfies the requirements laid out by this Court.

i. *Omnicare* is distinguishable from the present case and the actions of the Directors should, therefore, be protected under the business judgment rule.

Although the Court of Chancery did not rely on *Omnicare*, it is impossible to ignore the similarities to *Blasius* and the bearing it may have on this case. However, the two-part test employed in *Omnicare* should not be applied here. *Omnicare* presented a situation where directors rigged approval of a merger by guaranteeing via contract that over 50% of the outstanding stock would vote in the merger's favor. *Id.* at 936. This made it "mathematically impossible for any other merger to succeed." *Id.* Just as in *Blasius*, the actions of the board in *Omnicare* disenfranchised or precluded the stockholder vote.

Conversely, the Gaming Option approved by the Directors did not guarantee approval of the Merger. Praise Video's stockholders have not been divested of the opportunity to vote for or against the Merger, nor from collectively choosing to reject it. (Op. 10 n.12). Rather, the Gaming Option operated merely to "encourage many Praise Video stockholders to vote in favor of the Merger." (Op. 12). This case does not involve the majority of stockholders colluding with directors to the minority's detriment. Instead, the Gaming Option was a decision by the Directors to persuade stockholders to approve a merger that offered the best overall value to Praise Video as a PBC. (Op. 10–11).

If enhanced scrutiny is applied under *Omnicare* to defensive measures taken by PBC directors, they will be effectively defenseless to stop other corporations with adverse values from seizing control. This would eviscerate the purpose of the statutes governing PBCs, entities that exist to balance pecuniary interests with specific public benefits in a responsible manner. § 362(a). Because this case reflects a materially different situation, and because *Omnicare* did not contemplate the effects of PBCs, this Court should reject the use of enhanced scrutiny. Instead, the Directors' approval of the Gaming Option should be protected by the business judgment rule.

ii. Even if *Omnicare* requires enhanced scrutiny, the approval of the Gaming Option is still justified by Praise Video's existence as a PBC.

Even if the two-part test in *Omnicare* is applied, the actions of the Directors pass muster because of the unique nature of PBCs. Under this test, directors must demonstrate: (1) "reasonable grounds for believing that a danger to corporate policy and effectiveness existed;" and (2) that the measures were "reasonable in relation to the threat posed." *Omnicare*, 818 A.2d at 935. To be reasonable in relation to the threat posed, the measures must not be coercive or preclusive. *Id.* at 935 (quoting *Unocal*, 493 A.2d at 955). This is a factual question, but coercion exists where directors predetermine the outcome of a merger without regard to the merits of the bids. *Omnicare*, 818 A.2d at 936.

The Directors satisfied both parts of the *Omnicare* test in approving the Gaming Option. They had a reasonable belief Mercer would expand Praise Video into violent video games. (Op. 11). This would violate Praise Video's specific public benefit: to promote the values of the Mennonite Church. § 362; CONFESSION OF FAITH OF IN A MENNONITE PERSPECTIVE, ART. 22 ("We witness against all forms of violence."); (Op. 3, 11). The potential merger with Mercer was a direct threat to Praise Video's policy and its specific public under Delaware law.

The Gaming Option was reasonable in relation to this threat because it was not coercive or preclusive. The Directors did not predetermine the outcome of the stockholder vote on the Merger; they merely made it more attractive because it effectively balanced stockholders' pecuniary interests, other stakeholders' interests, and

Praise Video's specific public benefit. The Gaming Option also did not preclude the stockholders from voting or receiving all tender offers, and thus was not preclusive under *Omnicare*. (Op. 10). The Gaming Option was approved in good faith and fell within the range of reasonable responses to the threat posed by Mercer. (Op. 10). Therefore, the Directors' actions satisfy enhanced scrutiny.

Omnicare could not have, and did not, contemplate the existence of PBCs. Applying enhanced scrutiny to actions taken by a PBC to prevent it from being wholly consumed by an adverse entity is misguided; instead, such actions are entitled to protection under the business judgment rule. Even if enhanced scrutiny does apply, the Directors reasonably believed the Mercer bid posed a danger to Praise Video's specific public benefit, and the Gaming Option was neither coercive nor preclusive. As such, this Court should reverse the Court of Chancery and deny Plaintiffs' motion for a preliminary injunction.

CONCLUSION

Because the Directors appropriately balanced the three interests required under Delaware law, their decision to approve the Merger should stand. Furthermore, the Gaming Option was an appropriate mechanism to encourage stockholders to approve the Merger. Therefore, this Court should reverse the Court of Chancery and deny injunctive relief.

Respectfully submitted,

/s/ Team K

Team K, Counsel for Defendants - Below, Appellants

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