IN THE SUPREME COURT OF THE STATE OF DELAWARE

No. 43, 2014

PRAISE VIDEO, INC., a Delaware : corporation, JACOB BISSINGER, FRANCIS PENNOCK, MARK VAN ZANDT, : HOWARD METCALF, PETER HORNBERGER, NEW HOPE PUBLISHING :

CO., and PRASE NEW HOPE CORP., : On Appeal from the Court of Chancery
Defendants Below, : of the State of Delaware Appellants, :

: Civil Action No. 8974-CD

V.

MERCER CHRISTIAN PUBLISHING CO. : and SUSAN BEARD,

Plaintiffs Below, Appellees

Appellants' Opening Brief

TEAM L COUNSEL FOR APPELLANTS FILED: FEBRUARY 7, 2014

TABLE OF CONTENTS

TABLE	OF CITA	TIONS iii
NATUR	E OF PRO	CEEDINGS1
SUMMA	RY OF AR	GUMENT2
STATE	MENT OF	FACTS 3
ARGUM	ENT	
I.	BECAUSE AGREEMEN	RT OF CHANCERY'S PRELIMINARY INJUNCTION MUST BE REVERSED DEFENDANT BOARD'S DECISIONS TO APPROVE THE MERGER IT AND GAMING OPTION PROPERLY BALANCED THE § 362(B)
	Α.	QUESTION PRESENTED 7
	В.	SCOPE OF REVIEW 7
	С.	MERITS OF ARGUMENT 7
	1.	Defendant board's decisions properly balanced the public benefit interest factor in accordance with the requirements of § 362(b)
	i.	Directors of a public benefit corporation with a religious public benefit are required to balance pecuniary and stakeholder interests with the religious public benefit interest
	ii	. Defendant has an authorized corporate interest in promoting religious values
	2.	Section 365(b) requires finding that directors satisfied their fiduciary duties to stockholders and the corporation
II.	WITH THE	SE VIDEO BOARD'S DECISION TO APPROVE THE NEW HOPE BID GAMING OPTION SHOULD BE REVIEWED UNDER THE BUSINESS IT RULE RATHER THAN THE BLASIUS COMPELLING JUSTIFICATION 17
	Α.	QUESTION PRESENTED
	В.	SCOPE OF REVIEW
	С.	MERITS OF ARGUMENT

1.	The compelling justification standard should not apply here because the Gaming Option is not an action requiring closer scrutiny under <i>Blasius</i>
<u> </u>	i. The Gaming Option was not given <i>primarily to thwart</i> a stockholder vote and is therefore distinguishable from the facts in <i>Blasius</i>
Ė	ii. The Gaming Option was not an <i>immediate response</i> to the threat of takeover as in <i>Blasius</i>
2.	Even if this Court determines the <i>Blasius</i> standard should be expanded to include actions like granting the Gaming Option, the Board had a compelling justification for granting the Gaming Option
3.	The Board acted according to <i>Unocal</i> standards when granting the Gaming Option23
CONCLUSION.	

TABLE OF CITATIONS

Cases

Blasius Industries Inc. v. Atlas Corp., 564 A.2d 651 (Del. Ch. 1988) passim
Cede & Co. v. Technicolor, Inc., 634 A.2d 345 (1993)
Conestoga Wood Specialties Corp. v. Secretary of Health and Human Servs., et al., 725 F.3d 377 (3d Cir. 2013)
Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013). 14
<pre>In re MONY Grp., Inc. S'holder Litig., 853 A.2d 661 (Del. Ch. 2004).</pre>
Kaiser Aluminum Corp. v. Matheson, 681 A.2d 392 (Del. 1996)
Lawson v. Meconi, 897 A.2d 740 (Del. 2006)
Levitt v. Bouvier, 287 A.2d 671 (Del. 1972)
Martin Marietta Materials, Inc. v. Vulcan Materials Co., 68 A.3d 1208 (Del. 2012)
Mercier v. Inter-Tel (Delaware), Inc., 929 A.2d 786 (Del. Ch. 2007). 23
Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986)
Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985)
Stroud v. Grace, 606 A.2d 75 (Del. 1992)
Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361 (Del. 1995)
Unocal Corp. v. Mesa Petroleum, 493 A.2d 946 (Del. 1985). 2, 18, 24, 25
Williams v. Geier, 671 A.2d 1368 (Del. 1996)
Statutes
1 Del. C. § 303 9
8 Del. C. § 251 8, 21, 23
8 Del. C. §§ 360-368
8 Del C 8 362

8 Del. C. § 363
8 Del. C. § 365
Other Authorities
Bonnie G. Camden, Note, The Reasonableness of Defensive Takeover Maneuvers When the Corporate Raider is Mr. T. Boone Pickens: Ivanhoe Partners v. Newmont Mining Corp., 57 U. Cinn. L. Rev. 739 (1988) 2
William H. Clark, Jr. and Elizabeth K. Babson, How Benefit Corporations are Redefining the Purpose of Business Corporations, 38 William Mitchell L. Rev. 817 (2012)
Daniel Fisher, Delaware 'Public Benefit Corporation' Lets Directors Serve Three Masters Instead of One, Forbes (Jul. 14, 2013) 1
Dana B. Reiser, Benefit Corporations - A Sustainable Form of Organization?, 46 Wake Forest L. Rev. 591, 594 (2011) 9, 1

NATURE OF PROCEEDINGS

This interlocutory appeal comes to this Court following a January 14, 2014, Court of Chancery Memorandum Opinion by Chancellor Develin granting a preliminary injunction in favor of Plaintiffs Susan Beard and Mercer Christian Publishing Co. ("Mercer"). Defendants 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. appeal to this Court to remove the preliminary injunction and to allow the merger (the "New Hope Merger") to be consummated in the event of shareholder approval.

On December 9, 2013, the Praise Video board of directors (the "Board") accepted a merger bid by New Hope. Op. 11. Plaintiffs brought suit on December 13, 2013, to enjoin the New Hope Merger. Op. 12. Plaintiffs alleged that: (1) the Board breached its fiduciary duties by considering religious interests when selecting the New Hope bid over Mercer's higher-priced bid; and (2) that an option ("the Gaming Option") the Board granted to New Hope in accepting its effectively deprived shareholders of a vote on the New Hope Merger. Op. 12-16. The Court of Chancery granted the preliminary injunction on January 14, 2014. Op. 16. Chancellor Develin held that the Gaming Option deprived shareholders of a vote on the New Hope Merger and considered but did not decide whether, as a public corporation, the Board had properly balanced its religious pecuniary interests in evaluating the bids. Op. at 14-16. This Court accepted Defendant's appeal on January 23, 2014. Order Accepting Interlocutory Appeal.

SUMMARY OF ARGUMENT

- 1. The Court of Chancery's decision to grant a preliminary injunction must be reversed because the Board's decision to approve the New Hope Merger and grant the Gaming Option properly balanced the 8 Del. C. § 362(b) interests. The Board properly considered religious values in evaluating merger bids because a religious purpose was listed in Praise Video's certificate of incorporation, and § 362(b) authorizes such a purpose. Directors of a public benefit corporation with a religious public benefit must balance pecuniary, stakeholder, and religious interests. Thus, the directors satisfied their § 365(b) fiduciary duties to stockholders and the corporation.
- Second, the Board's approval of the New Hope bid and Gaming 2. Option should have been evaluated by applying the business judgment rule rather than the compelling justification standard. The compelling justification standard should not apply here because the Gaming Option is not an action requiring closer scrutiny under Blasius Industries Inc. v. Atlas Corp., 564 A.2d 651 (Del. Ch. 1988); unlike in Blasius, the option was not granted primarily to thwart a stockholder vote nor as an immediate response to a takeover threat. Instead, the Board's decision should be evaluated using the business judgment rule under Unocal Corp. v. Mesa Petroleum, 493 A.2d 946 (Del. 1985), because the Board, after reasonable investigation, responded proportionally to a legitimate threat to corporate policy. Even if this Court applies the compelling justification standard, the Board had a justification; its certificate of incorporation required it to balance religious, pecuniary, and stakeholder interests.

STATEMENT OF FACTS

Praise Video incorporated in Delaware in the 1970s. Op. 3. It began as a small family business and still only has approximately 250 shareholders. Op. 3-4. Its entire Board and the vast majority of its shareholders are either members of the Mennonite Church USA (the "Church") or "related by blood or marriage to members of the Church." Op. 4. Praise Video produces and distributes "wholesome" film and digital entertainment," often depicting bible stores, and bills these "an products alternative to violent or sexually offensive as entertainment generally offered by secular media." Op. 4. In 2003, Praise Video expanded its offerings to include Christian-themed video games, including its popular Ark of Justice® game released in 2010. Op. 4. Recently, Praise Video's annual profits averaged about \$4 million; the gaming division generates approximately 60% of these profits. Op. 4.

Jacob Bissinger, CEO since Praise Video's incorporation and owner of approximately 22% of its stock, decided in early 2013 to retire within the year. Op. 4, 6. Consequently, he determined that he needed to "diversify his investments" by selling his Praise Video shares. Op. 6. He then informed the Board about his decision, prompting the Board to hire financial advisor Norman Stoltzfus to seek out potential transactions through which shareholders could sell or exchange their shares. Op. 5-6.

In June 2013, Mercer emerged as a potential bidder willing to pay "north of \$40" for Praise Video shares. Op. 5, 7. While Mercer itself produces Christian-oriented products, including digital products, its

parent company, Mercer Media, Inc., is a "large, multinational media conglomerate." Op. 5. Mercer planned to use Praise Video's gaming operations to produce combat-oriented video games. Op. 7.

Stoltzfus reported about Mercer's interest to the Board on June 24, 2013, and, initially, the board expressed approval of the price Mercer had indicated and of Stoltzfus's ability to find bidders with Christian values. Op. 7. However, Board members became upset upon learning that Mercer planned to expand gaming operations into combat video games. Op. 7. The Board then instructed Stoltzfus to seek out additional bidders who would better accord with Church values. Op. 8.

After the meeting, Praise Video's counsel advised the Board that if Praise Video were instead a public benefit corporation, their duties in shopping the company might be different because they could consider purposes other than financial interests. Op. 8. In response, the Board, with only Holbrook voting against the decision, decided to translate the company into a public benefit corporation ("the Reorganization"). Op. 4-5, 8. On September 30, 2013, Praise Video formed a Delaware public benefit corporation, listing in the certificate of incorporation its public benefit to be "'the promotion of the values articulated in the Confession of Faith in a Mennonite Perspective." Op. 3. Parties stipulate that this is a valid public benefit under Delaware law. Op. 3. Before the shareholder vote, the Board disclosed its reasons for seeking the Reorganization, including Bissinger's retirement plan, the potential sale of the company, and a desire to have "greater legal flexibility in a sale of the company to take into consideration Mennonite values as well as maximization of

financial wealth;" the shareholders were also given the text of the public benefit corporation statute. Op. 8-9. More than 90% of Praise Video's outstanding shares voted for the Reorganization, as required for approval by 8 Del. C. § 363(a). No shareholders sought appraisal rights. Op. 5.

After the Reorganization, Director Pennock presented an alternative to the Board which he stated would offer at least the \$40 price Mercer had suggested but would also allow the Board to keep post-merger operations in line with Church values. Op. 9. Pennock joined with Miller Price L.P., a venture capital business that aims to "balance financial gains with religious values" and has two equal partners, one of whom is a member of the Church, to incorporate New Hope (with Pennock owning 20% of its shares and Miller Price, L.P. owning 80%); New Hope then formed Praise New Hope, Inc., a whollyowned subsidiary, for the purpose of merging it with Praise Video. Op. 6.

Interested companies submitted final bids on December 5, 2013. Op. 9. Mercer submitted a fully financed bid of \$50 per share. Op. 9. New Hope submitted its bid of \$41 per share. Op. 9-10. Both bids were equivalent in other respects except that New Hope's bid included a provision requiring Praise Video to grant it "an option . . . to acquire Praise Video's gaming division for \$18 million, payable in 5-year installment notes;" the Gaming Option would be triggered if the Praise Video shareholders did not approve the New Hope Merger, a merger agreement with another company was announced and not withdrawn, and Praise Video consummated such merger within twelve months. Op. 9-

10 & n. 12. In return, New Hope promised to appoint Pennock CEO of the resulting company to ensure that operations would continue to accord with Church values. Op. 10.

On December 9, 2013, the Board discussed the bids' merits for over seven hours. Op. 10. Plaintiffs stipulated that "there was nothing material lacking in the director's informational base," Op. 10, and the Court of Chancery concluded "that the company had been thoroughly shopped." Op. 11. Several directors expressed concern about whether Mercer would preserve Praise Video's Mennonite principles given the information about the combat games. Op. 11. Ultimately, the directors voted 4-1 (Holbrook voted against, and Pennock abstained) to accept New Hope's bid "because it appropriately balanced the stockholders' pecuniary interests, the best interests of materially affected by Praise Video's conduct, and the public benefit identified in its certificate of incorporation." Op. 11. In approving the bid, the directors noted that the Gaming Option's undervaluation of the gaming division would increase the appeal of the New Hope Merger to shareholders who otherwise would have taken Mercer's higherpriced bid. Op. 12.

On December 13, 2013, Mercer and Susan Beard, a non-member of the Church who had inherited approximately 3% of the Praise Video shares from her parents, initiated a suit against Defendants, alleging breach of fiduciary duty and seeking to enjoin the New Hope Merger. Op. 5, 12. Chancellor Develin granted the Plaintiffs' motion for preliminary injunction. Op. 16.

ARGUMENT

I. THE COURT OF CHANCERY'S PRELIMINARY INJUNCTION MUST BE REVERSED BECAUSE DEFENDANT BOARD'S DECISIONS TO APPROVE THE MERGER AGREEMENT AND GAMING OPTION PROPERLY BALANCED THE § 362(B) INTERESTS.

A. QUESTION PRESENTED

Does a board of directors of a public benefit corporation which has identified a religious public benefit in its certificate of incorporation breach its fiduciary duties when it considers religious interests during the evaluation of merger bids?

B. SCOPE OF REVIEW

This Court reviews the Court of Chancery's decision to grant a motion for preliminary injunction for abuse of discretion. Martin Marietta Materials, Inc. v. Vulcan Materials Co., 68 A.3d 1208, 1218 (Del. 2012). However, "this Court reviews the grant of a preliminary injunction without deference to the embedded legal conclusions of the trial court." Kaiser Aluminum Corp. v. Matheson, 681 A.2d 392, 394 (Del. 1996). Consequently, "the Court of Chancery's legal conclusions are subject to de novo review." Lawson v. Meconi, 897 A.2d 740, 743 (Del. 2006). Factual findings "will be accepted if 'they are sufficiently supported by the record and are the product of an orderly and logical deductive process.'" Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1385 (Del. 1995) (quoting Levitt v. Bouvier, 287 A.2d 671, 673 (Del. 1972)).

C. MERITS OF ARGUMENT

The Court must reverse and remand the preliminary injunction granted against Defendants because the Praise Video Board's approval

of the New Hope merger agreement properly balanced its religious public benefit interest in accordance with the 8 Del. C. § 362(a) balancing requirement. Further, § 365(b)'s standard of review for directors requires a finding that the directors satisfied their duties to shareholders.

- 1. Defendant board's decisions properly balanced the public benefit interest factor in accordance with the requirements of § 362(b).
 - i. Directors of a public benefit corporation with a religious public benefit are required to balance pecuniary and stakeholder interests with the religious public benefit interest.

In Delaware, directors are must manage a public benefit 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 benefit or public benefits identified in its certificate of incorporation." 8 Del. C. § 362(a).

The statement of director duty for public benefit corporations reflects a departure from the rules governing other Delaware corporations. Under § 251, directors have a duty of care, when considering a proposed merger or consolidation, "to act in an informed and deliberate manner in determining whether to approve an agreement of merger before submitting the proposal to the stockholders." Smith v. Van Gorkum, 488 A.2d 858, 873 (Del. 1985). Once the sale of the non-public benefit corporation is inevitable, directors' duties switch from preserving the corporate entity to "the maximization of the company's value at a sale for the stockholders' benefit." Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986).

It is against this backdrop of *Revlon* duties that public benefit corporation law took form. After 2010, several states enacted legislation adding public benefit corporations to their codes. Dana B. Reiser, *Benefit Corporations - A Sustainable Form of Organization?*, 46 Wake Forest L. Rev. 591, 594 (2011). Delaware followed suit in 2013. 8 Del. C. §§ 360-368 (the "Act"). This legislation empowers directors of Delaware public benefit corporations to consider factors other than the maximization of shareholder value in making decisions, and Defendants contend that this includes change-of-control decisions. *See* § 362(a).

Professor Reiser suggests that the intent of the language of the first public benefit corporation statutes is to expand the range of appropriate considerations "to give directors discretion to make decisions favoring social mission achievement over profitmaximization." Reiser, supra, at 599. The statutory language is:

clearly modeled on language from constituency statutes, also known as anti-takeover legislation. [Constituency statutes] permit directors to consider nonshareholder constituencies in weighing takeover offers and other decisions and have been criticized as simply giving directors cover to vote against control-shifting transactions and to take other actions in order to entrench themselves in their positions.

Id. Professor Reiser contends that the "broad discretion" conferred to directors by public benefit corporation statutes is analogous to the broad discretion conferred by constituency statutes. Id. at 599-600.

The Delaware Code provides that "[w]ords and phrases shall be read with their context and shall be construed according to the common and approved usage of the English language. 1 Del. C. § 303. Furthermore, "[a]bsent a clearly expressed legislative intent to the

contrary, that language must ordinarily be regarded as conclusive."

Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108

(1980). Delaware courts employ the plain meaning rule. New Castle

Cnty. v. Chrysler Corp., 681 A.2d 1077, 1081-82 (Del. 1998).

Applying these principles of statutory interpretation to § 362, the meaning of the statute is clear when the words are given their plain meaning. Section 362(a) establishes the nature of a public benefit corporation as a "for-profit corporation" that is "intended to produce a public benefit . . . and to operate in a responsible and sustainable manner." § 362(a). The statute continues: "To that end, a public benefit corporation shall be managed in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate incorporation." § 362(a) (emphasis added). The language, "To that end," suggests that the balancing test is intended to further the "public benefit" and the "responsible and sustainable" operation of the public benefit corporation. See § 362(a).

Starting with the first of the three interests in the § 362(a) balancing requirement, "the stockholders' pecuniary interests" is unambiguously referring to shareholder value. The "best interests of those materially affected by the corporation's conduct" is less obvious, but it appears to refer to a broad group of stakeholders, including employees, customers, and suppliers. The "public benefit" is defined in 362(b), which specifically allows a "public benefit" to be "a [positive] effect of [a] . . religious" nature. § 362(b).

The word "shall" unequivocally indicates that management must comply with the balancing requirement. The plain language of § 362(a) requires directors to consider the public benefit in making decisions for the public benefit corporation. The requirement to manage the corporation "in a manner that balances" the three interests suggests that all three interests must be considered or weighed in decision-making. The statute does not define "balance," but plain meaning would suggest that directors must attempt to give equal weight to each of the three interests. Thus, it would be improper to use only one factor in making a corporate decision.

The § 362(a) balancing requirement allows directors of a public benefit corporation to consider how the corporation will be operated after it is sold. Directors violate § 362(a) if their managerial decisions do not balance the three interests. Professor Reiser's scholarship regarding the origins of public benefit corporation statutes in constituency statutes suggests that public benefit corporations were intended to allow directors to make merger decisions that would be not otherwise be permissible under *Revlon*. See Reiser, supra, at 599.

Both corporate leaders and other legal insiders interpret public benefit corporation statutes to circumvent Revlon in change-of-control situations. William Clark, who wrote the model legislation used by the first nineteen adopting states (but not Delaware), states that, "It's very clear you can turn down more cash to protect the mission." Daniel Fisher, Delaware 'Public Benefit Corporation' Lets Directors Serve Three Masters Instead of One, Forbes (Jul. 14, 2013). Clark further

states "[i]t is against the paradigm of shareholder primacy that benefit corporation statutes have been drafted. . . . The statutes vary in their details from state to state, but share major characteristics." William H. Clark, Jr. and Elizabeth K. Babson, How Benefit Corporations are Redefining the Purpose of Business Corporations, 38 William Mitchell L. Rev. 817, 838 (2012).

Furthermore, the notice and shareholder approval requirements inherent in public benefit corporations suggest that the expansive balancing requirement reaches change of control situations. To change another Delaware corporation into a public benefit corporation requires 90% shareholder approval from all classes of stock. 8 Del. C. § 363(a). This high bar prevents the application of public benefit corporation law without overwhelming shareholder approval.

Defendant Praise Video directors satisfied the § 362(a) balancing requirement by giving due consideration to each interest. Regarding the shareholders' pecuniary interest, Mercer's offer of \$50 per share undoubtedly exceeded New Hope's offer at \$41. Op. 2. However, because Praise Video was a public benefit corporation, its directors had other factors to consider. The Praise Video directors conducted a thorough inquiry into how its religious interests would be continued by each corporation. Mercer is a wholly-owned subsidiary of Mercer Media, Inc., which is a secular multinational media conglomerate, Op. 5, and its post-merger plan involves expanding Praise Video's gaming business into combat-oriented video games. Op. 7. On the other hand, a merger with New Hope offers complete ownership and control by two Mennonites and one non-member, and it entails appointing Pennock (a Mennonite and

current Praise Video director) to lead as CEO. Op. 4-6. Miller Price L.P. would be the majority owner, and its investment strategy "seek[s] to balance financial gains with religious values." Op. 6.

Praise Video's directors were faced these two competing offers, one of which virtually guaranteed that its video game business would begin making violent video games, completely at odds with the Mennonite faith's stance against violence. A merger with New Hope promised continued Mennonite leadership and ownership. Mercer's statement regarding its "Christian" values does not offer any reassurance, given that whatever version of Christianity it promotes, it is not in lockstep with Mennonite nonviolence principles.

The Court of Chancery did not address the remaining interest, "the best interests of those materially affected by the corporation's conduct," in its opinion. Appellants suggest that its employees and customers are materially affected by Praise Video's conduct. Furthermore, these individuals would be better off if Praise Video continued operations under Mennonite leadership, because it limits exposure to violent video games.

In balancing all three of these factors, Praise Video's directors chose New Hope's lower bid. As discussed in detail infra p. 20, what the New Hope bid lacked in financial compensation it made up for in the promise of continuing the religious public benefit that was so important to the Praise Video shareholders and directors, the vast majority of whom were members of the Mennonite Church.

There is no reason to believe that \$41 was an unreasonable price. It was "north of \$40," which was Mercer's initial estimate of what

Praise Video might draw. Op. 7. The New Hope Merger offered the balance of interests the Praise Video directors were obliged promote.

ii. Defendant has an authorized corporate interest in promoting religious values.

The holdings of *Conestoga* and *Hobby Lobby* do not apply to public benefit corporations because they only reach non-public benefit corporations. In *Conestoga*, the Third Circuit held that "for-profit, secular corporations cannot engage in religious exercise." *Conestoga Wood Specialties Corp. v. Secretary of Health and Human Servs.*, et al., 725 F.3d 377, 381 (3d Cir. 2013) (emphasis added). This holding has no bearing on the present case, because it does not address a public benefit corporation. *See id.* From the outset, the *Conestoga* court identifies Conestoga Wood Specialties Corp. as a Pennsylvania "for-profit, secular corporation." *Id.* Thus, the holding of *Conestoga* does not apply here.

The Tenth Circuit recently held that for-profit corporations can engage in religious exercise in Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013). Id. at 1128-37. Hobby Lobby involved two closely-held corporations, owned by religious individuals and run in a manner so as to reflect Christian principles. Id. at 1121. The Supreme Court granted certiorari to consider Hobby Lobby alongside Conestoga. Op. 14 n.16. The Hobby Lobby holding is not binding precedent for the present case for two reasons: (1) the corporations involved in Hobby Lobby are not public benefit corporations, and (2) Delaware falls under the jurisdiction of the Third Circuit, not the Tenth.

2. Section 365(b) requires finding that directors satisfied their fiduciary duties to stockholders and the corporation.

Section 365(b) of the Act contains the standard of review for Board decisions implicating the balance requirement. It states that "with respect to a decision implicating the balance requirement . . . [a director] will be deemed to satisfy such director's fiduciary duties to stockholders and the corporation if such director's decision is both informed and disinterested and not such that no person of ordinary, sound judgment would approve." This language discusses the director duty of loyalty, which:

mandates that the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director. Classic examples of director self-interest in a business transaction involve either a director appearing on both sides of a transaction or a director receiving a personal benefit from a transaction not received by the shareholders generally.

Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361-62 (1993).

Here, Pennock was the only director on the Praise Video Board who had an interest in the outcome of the December 9 vote, because he was a 20% owner of New Hope and he would become CEO if the merger were accepted. Op. 6. Pennock's abstention from deliberation and voting at both the mid-November and December 9 board meetings rebuts any assertion that Praise Video's board was interested. Op. 9, 11. Bissinger's statement that he could not accept Mercer's offer regardless of its higher price actually demonstrates that Bissinger was looking only to the merits of the transaction, given that Bissinger was trying to sell his shares in Praise Video to diversify his investments. See Op. 9-10. Bissinger believed the Mercer offer

lacked merit because it required abandoning one of the three interests he was obliged to balance. Additionally, Bissinger's statement cannot be construed as saying, "I will only accept the New Hope bid;" it was merely an assertion that the terms of the Mercer deal were unacceptable based on his balancing of all three public benefit corporation factors.

The record also indicates that the decision was fully informed. Chancellor Develin agreed with the directors that "the company had been thoroughly shopped and that there was no reasonable prospect that any bids superior in any overall respect to the New Hope and Mercer bids would be forthcoming in any reasonable time frame." Op. 11. Given the religious interest chosen by Praise Video's directors and shareholders, the board made a conscious decision to accept a better offer.

II. THE PRAISE VIDEO BOARD'S DECISION TO APPROVE THE NEW HOPE BID WITH THE GAMING OPTION SHOULD BE REVIEWED UNDER THE BUSINESS JUDGEMENT RULE RATHER THAN THE BLASIUS COMPELLING JUSTIFICATION STANDARD.

A. QUESTION PRESENTED

Does a board of directors of a public benefit corporation breach its fiduciary duties when, although it had received a higher-priced merger bid, it accepts a bid with a provision containing an option to buy its crown jewel for an undervalued price which is triggered if the public benefit corporation then merges with another company instead of that bidder?

B. SCOPE OF REVIEW

This Court reviews for abuse of discretion the grant of a preliminary injunction, but it reviews de novo the Court of Chancery's legal conclusions. Lawson v. Meconi, 897 A.2d 740, 743 (Del. 2006). Factual findings "will be accepted if 'they are sufficiently supported by the record and are the product of an orderly and logical deductive process.'" Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1385 (Del. 1995) (quoting Levitt v. Bouvier, 287 A.2d 671, 673 (Del. 1972)).

C. MERITS OF ARGUMENT

The Court of Chancery incorrectly based its decision to grant Plaintiffs' motion for preliminary injunction on the *Blasius* standard of review, and that decision should be reversed.

1. The compelling justification standard should not apply here because the Gaming Option is not an action requiring closer scrutiny under *Blasius*.

The Court of Chancery used a compelling justification standard to review the Board's grant of a Gaming Option to New Hope, citing

Chancellor Allen's opinion in *Blasius Industries Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988). Chancellor Allen recognized the principle of Delaware law set out in *Unocal Corp. v. Mesa Petroleum*, 493 A.2d 946 (Del. 1985), that a board may act to defeat a threat to change of corporate control if acting reasonably in good faith *Blasius*, 564 A.2d at 659. However, Chancellor Allen held that if a board's action to defeat the threat of change of control was "designed with the primary purpose of interfering with the effectiveness of a stockholder vote," a court must review such action with "closer scrutiny." *Id.* This is the compelling justification standard.

This Court has stated that the *Blasius* standard applies sparingly due to its stringency. *In re MONY Grp.*, *Inc. S'holder Litig.*, 853 A.2d 661, 674 (Del. Ch. 2004). See, e.g., *Williams v. Geier*, 671 A.2d 1368, 1376 (Del. 1996); *Stroud v. Grace*, 606 A.2d 75, 95 (Del. 1992). Thus, courts have been reluctant to extend *the* compelling justification review beyond the type of situation present in *Blasius*. Courts have limited use of the compelling justification standard to a board's action that limits stockholder's full and fair participation and seeks "to thwart what appears to be the will of a majority of the stockholders." *In re MONY Grp.*, 853 A.2d at 674.

i. The Gaming Option was not given primarily to thwart a stockholder vote and is therefore distinguishable from the facts in Blasius.

In *Blasius*, the court justified using a compelling justification standard to review the Atlas Inc. board's actions because it found an extraordinary need to preserve the balance of authority between shareholders and a board. *Blasius*, 564 A.2d at 660. The court stated

that shareholders essentially have only two protections against the actions of a board of directors: (1) shareholders may sell their stock, or (2) they may vote to replace the board members. *Id*.

Centrally important in the Blasius decision, the board of directors acted primarily to prevent a majority of stockholders from proceeding in a manner favored by the majority of the shareholders but repugnant to the directors. Id. at 660. See also In re MONY Grp Inc. S'holder Litig., 853 A.2d at 674 (stating that the Blasius standard arises ordinarily "if a clear majority of stockholders has voiced disapproval of the transaction" and the board acts so as to "'thwart [that] shareholder majority'" (quoting Blasius, 564 A.2d at 660)). The Atlas board's response to such a threat was to place two new members on the board of directors so as to prevent a majority of stockholders from expanding the board to its maximum allowable number of members and filling it with directors who would be faithful to Blasius. Blasius, 564 A.2d at 655. Thus, the actions of the Atlas board effectively prevented the stockholders from voting to change control of the board by preventing the shareholders from voting on two board positions. Id. Thus, in holding Blasius inapplicable, the Delaware Supreme Court in Stroud v. Grace, 606 A.2d 75 (Del. 1992), summarized the compelling justification standard as applicable only when the "'primary purpose' of the board's action [is] to interfere with or impede exercise of the shareholder franchise," and the stockholders are not given a "full and fair opportunity to vote." Id. at 92.

The matter at issue here is not the type of directorial control at issue in Blasius, and therefore courts should not apply "the

exacting Blasius standard." In re MONY Grp., Inc. S'holder Litig., 853 A.2d 661, 674 (Del. Ch. 2004). The Atlas board's actions prevented a shareholder vote in two ways: first, the shareholders were prevented from even voting on two board positions; and second, the will of the majority of shareholders was impeded because they were prevented from placing a majority of directors on the board. Blasius, 564 A.2d at 660. In contrast, the Praise Video Board's action did not deny the shareholders a vote, nor did it thwart the will of the majority of shareholders. The Board acted in a manner consistent with the majority of shareholders by granting the Gaming Option. The Gaming Option was issued to ensure that gaming operations would continue to promote Church values, an interest identified in Praise Video's certificate of incorporation. Notably, the shareholders will still be able to vote to approve or not approve the New Hope Merger.

The Gaming Option, although undervaluing the gaming operations, actually serves to increase the benefits of New Hope's bid in a manner consistent with 8 Del. C. § 362(b). Because the Board was required to balance pecuniary interests with the public benefit identified in Praise Video's certificate of incorporation, the Gaming Option was given in consideration for the agreement that New Hope would operate Praise Video "in a manner consistent with the values of the Church" as required by the certificate of incorporation's public benefit provision. Op. 10. In effect, the Gaming Option granted by the Board increased the value of New Hope's bid in a manner approved of by the shareholders when voting for the Reorganization. The shareholders knew, because the Board had disclosed its intentions, that becoming a

public benefit corporation would influence the way the Board evaluated any bid for merger, and the shareholders approved the Reorganization, with more than a 90% majority. The Gaming Option acts as positive influence on the decision of a shareholder in much the same way as a higher bidding price would. The Gaming Option ensures that the most lucrative part of the public benefit corporation will continue to operate consistently with the public benefit vision the vast majority of Praise Video shareholders had agreed upon.

Without the Gaming Option, it is possible no merger would have been a success. Section 363(c) of the Act requires two-thirds of outstanding shares and each class of stock (voting or not) to approve a merger if the corporation is becoming a non-public benefit corporation. This requirement is more restrictive than the voting requirements of 8 Del. C. § 251 (applicable to corporations), which mandates only that a majority of the outstanding stock of the corporation vote for the adoption of the agreement. A significant number of stockholders, 90% of whom voted to approve Reorganization, might not approve of the possibility that Mercer would expand operations into combat gaming. Indeed, it is unrefuted that Bissinger, who owned 22% of the shares, would not have approved of a Mercer bid regardless of the financial difference because of the possibility of post-merger expansion into combat games. Op. 4, Such disapproval makes approval of a merger with Mercer unlikely.

The Board's actions taken to achieve shareholder approval of the New Hope Merger is not within the *Blasius* categories of prohibited acts. Ninety percent of the shareholders approved of the public

benefit Reorganization in full knowledge that the Board would consider the public benefit purpose in any merger situation. See In re MONY Grp., Inc. S'holder Litig., 853 A.2d 661, 675-76 (Del. Ch. 2004) (recognizing "that once a board of directors deems a merger agreement favorable, it may employ various legal powers to achieve a favorable outcome on a shareholder vote"). Once the Board recognized the benefit of merging with New Hope, the Gaming Option was reasonably related to the merits of New Hope's bid. Id.

ii. The Gaming Option was not an *immediate response* to the threat of takeover as in *Blasius*.

The *Blasius* court emphasized that the Atlas board's act of placing two new board members on the board would not have been questionable had it not been an immediate response to threat of takeover. *Blasius*, 564 A.2d at 655. Here, the Board did not grant the Gaming Option as an immediate response to Mercer's offer. In fact, the Board was initially open and interested in the prospect of a merger with Mercer. Op. 7. The Board only became concerned when it was clear the merger would likely result in a use of the gaming operations contrary to the interests of shareholders. Op. 7. Additionally, once the Board had this information, it invested time and resources into finding more suitable merger opportunities. Op. 8. The Gaming Option was not an immediate reaction to thwart shareholder approval of a prospective merger with Mercer. Instead, the Board approved the Gaming Option in order to make New Hope's offer more enticing. Op. 10.

2. Even if this Court determines the *Blasius* standard should be expanded to include actions like granting the Gaming Option, the Board had a compelling justification for granting the Gaming Option.

If a compelling justification standard extends beyond the *Blasius* facts, courts should separate the compelling justification standard from a per se standard of review. A board's actions requiring analysis under *Blasius* may be disenfranchising but are not a breach of fiduciary duties per se. Williams v. Geier, 671 A.2d 1368, 1376 (Del. 1996). Thus, if courts consider extending compelling justification review beyond the facts in *Blasius*, it is necessary to recognize when there is an obvious compelling justification so that the standard does not become insurmountable. Otherwise, "the temptation to avoid applying the standard as an actual means to make a decision rather than a post-hoc label will remain." Mercier v. Inter-Tel (Delaware), Inc., 929 A.2d 786, 810 (Del. Ch. 2007).

There is no more compelling justification for a Board's actions than the justification that the Board acted according to applicable statutory law. Both 8 Del C. §§ 251(c) and § 362 are statutes that must work in harmony; a court cannot create a hierarchy based on its own views of importance. Section 362 would influence the decisions of a Board regarding both who might be acceptable buyers and whom to finally sell to. Differences between regular corporations and public benefit corporations must be recognized. See infra p.8.

3. The Board acted according to *Unocal* standards when granting the Gaming Option.

Unocal requires a board of directors to show that a defensive measure was taken as a proportional step against a "danger to

corporate policy and effectiveness" that the directors reasonably investigated and believe to be present. Unocal v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985). Reasonable investigation requires that directors inform themselves "of all material information reasonably available to them" prior to making a decision. See Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985). Lastly, the board must show that the defensive measure was proportional to the threat. Id. The business judgment rule then applies, and the plaintiffs have the burden to show a breach of the directors' fiduciary duties. Id. at 958.

According to Chancellor Develin, the Board carefully reviewed the prospect of a merger with Mercer. Op. 16. Chancellor Develin opined that the Board acted (1) without conflicting interest; (2) with due care; and (3) in good faith. Op. 16. Mercer planned to expand the gaming operations into areas of combat, in direct opposition shareholder wishes, and the Board sought other opportunities. Op. 8. The Board reasonably concluded the Mercer merger would be a threat to corporate policy and best interests of the shareholders. See Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985).

Defendants posit that the Gaming Option was used as added consideration to make New Hope's bid more attractive and plausible and not as a defensive measure against Mercer. However, courts have recognized a board's power to sell its most successful division to another friendly corporation or investor as a defensive measure. See Unocal, 493 A.2d at 957; Bonnie G. Camden, Note, The Reasonableness of Defensive Takeover Maneuvers when the Corporate

Raider is Mr. T. Boone Pickens: Ivanhoe Partners v. Newmont Mining Corp., 57 U. Cinn. L. Rev. 739, 751 (1988). Indeed, a white knight is a "friendly third party investor." Camden, supra, at 751 n.92.

The Gaming Option was an appropriately proportional use of the Board's power. A merger with Mercer was objectionable to the Board and to shareholders because Mercer acknowledged its plans to expand operations into combat games, directly in confrontation with the shareholders' public benefit vision. Giving New Hope the option directly and narrowly addresses any concern Praise Video had about merging with Mercer. The Gaming Option is a middle road compromise, in which New Hope forgoes the balancing requirements inherent in public benefit corporations, and the shareholders of Praise Video are assured that no violent gaming operations will be implemented contrary to their religious values. Thus, the Board acted according to Unocal standards and its decision to grant the Gaming Option to New Hope should be reviewed in accordance with the business judgment rule.

CONCLUSION

For the reasons stated herein, this Court should REVERSE the Court of Chancery's grant of Plaintiffs' motion for preliminary injunction.

Respectfully submitted,

Team L Counsel for Appellants February 7, 2014