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Irwin Warren and Bradley Aronstam, Delaware's Business Judgment Rule and Varying Standards of Judicial Review Assessing Director Conduct in M&A Transactions (2007), http://www.seitzross.com/media/article/12_Canadian%20Institute%20Article.pdf.26

Nature of Proceedings

Plaintiff-Appellee Mercer Christian Publishing Co. and Susan Beard ("Mercer") commenced the underlying proceeding against Defendants-Appellants Praise Video Inc. ("Praise Video"), its five directors (Jacob Bissinger, Francis Pennock, Mark Van Zandt, Howard Metcalf, and Peter Hornberger), New Hope Publishing Co., and Praise New Hope Corp. ("New Hope") on December 13, 2013 to prevent Praise Video from carrying out a merger agreement with New Hope. Mercer owns 2% stock in Praise Video.

The Delaware Court of Chancery granted Mercer's motion for preliminary injunction and found that the defendant directors intentionally deprived the stockholders of their statutorily-mandated right to vote on the merger and determined for themselves whether the balance of pecuniary considerations and public benefit warrant a favorable vote on a transaction. (Prelim. Inj. Ord. 16).

Accordingly, the Delaware Court of Chancery granted a preliminary injunction in favor of Mercer temporarily enjoining the defendant's merger with New Hope. Chancellor Sean Develin issued an opinion on January 14, 2014. An order granting the injunction was issued on January 15, 2014. On January 22, 2014, the defendant-appellant's filed a Notice of Appeal from Interlocutory Order, which was granted shortly after on January 23, 2014. This is appellee Mercer's opening brief.

Summary of Argument

The Praise Video board of directors granted New Hope the Gaming Option, which was considered the "crown jewel" of Praise Video. By

granting the Gaming Option, the board of directors implemented an improper defense tactic designed to thwart the right of the shareholders' to vote on the merger transaction with no compelling justification for the action. By taking this action for the sole purpose of thwarting the directors breached their fiduciary duty under the *Blasius* rule and in the alternative under the *Unocal* rule.

The Praise Video directors also breached their fiduciary duty to shareholders in regard to the public benefit corporation statutes under which Praise Video is incorporated. The directors failed to balance the pecuniary interests of shareholders, the interests of those materially affected by the corporation's conduct, and the specific public benefit identified in its certificate of incorporation.

Statement of Facts

The appellant, Praise Video, Inc., became a public benefit corporation under Delaware law in 2013. *Mem. Op. pg. 3.* The newly formed public benefit corporation identifies a positive effect of a religious nature as its public benefit in its charter, as is required by Delaware statute. *Id.* Before becoming a public benefit corporation, Praise Video began its business as a Delaware corporation in the middle of the 1970's. *Id.* In 2003 Praise video modernized its business by adding a video game division to include Christian themed video games. *Mem. Op. pg. 4.* This new line of games provided Praise Video with constant financial success with 60 percent of Praise Videos profit stemming from the gaming division. *Id.*

From its inception, the corporation has been closely connected with the Mennonite Church USA. *Id.* The majority of stockholders have some relation to the Church, through membership or relation to Church members, although it is not required. *Id.* The largest individual share of the corporation belongs to Jacob Bissinger who has served as the CEO and a director of Praise Video since its commencement. *Id.* Bissinger owns 22 percent of the corporation while the other directors own an aggregate of 4 percent of the shares. *Id.* Each of the members of the board of directors is required to be a member of the Church due to a qualification provision in the original certificate of incorporation. *Mem. Op.5.*

Appellee, Mercer Christian Publishing company (Mercer), is an indirect wholly-owned subsidiary of Mercer Media, Inc., an international media conglomerate headquartered in New York, New York. *Id.* Mercer was acquired by Mercer Media in 2009. *Id.* After the acquisition Mercer kept its headquarters in Florida and its identity as a company whose mission is to "spread inspiration by developing and distributing content that promotes biblical values and honors Jesus Christ." *Id.* Mercer is known for its best-selling Bibles, inspirational books, resources for church school curricula, and audio and digital Christian faith-based content. *Id.* Mercer owns about 2% of Praise Video's shares that it acquired for thirty-five dollars a share from another shareholder. *Id.*

The present merger situation commenced in early 2013 when CEO Bissinger expressed desire of to retire and liquidate his 22 percent interest in Praise Video. *Mem. Op. 6.* In March 2013 the directors of

Praise Video hired Norman Stoltzfus to explore options where Bissinger and other stockholders of Praise Video could liquidate their positions in the corporation. *Id.* In only a few months Stoltzfus identified a number of bidders that could acquire Praise for cash or stock. *Id.*

Mercer made a suggested offer for an acquisition at a price "north of \$40." per share. *Id.* Mercer's suggestion drew a board meeting where members praised Stoltzfus for finding a buyer that carried a similar corporate identity and appeared to support Christian percepts. *Mem. Op. 7.* During the meeting Stoltzfus indicated that Mercer expressed that with a capital infusion and some synergies between the two existing corporations the revenues after a merger would be enhanced. *Id.* Stoltzfus also pointed out the merger may lead to combat-oriented video games for the new company which conflicts with Church doctrine. *Id.* At this point in the meeting Director Holbrook, who is the only director not named in the lawsuit because he voted against the merger, expressed concern for the directors reactions because they were obligated to achieve the highest and best sale price for the shareholders of the corporation and not allow individual moral views on how that a company should be run after it is sold. *Mem. Op. 8.* Holbrook reiterated that any attempt to dictate how Praise Video should operate after the sale is not the duty of the current directors but is put on the individual conscious of those purchasing the company. *Id.*

After that meeting the directors asked Stoltzfus to look for bidders who may offer the best price but line up more with the moral conscious of Praise Video. *Id.* Also, the legal counsel for Praise

Video notified the directors that, as Holbrook had stated, they did have an obligation to obtain the highest and best price for their stockholders. *Id.* The legal counsel also mentioned reorganization into a new statute based public benefit corporation as a way to alter the legal obligations of the directors in a merger. *Id.*

After the meeting with legal counsel and Stoltzfus the board approved a reorganization merger shifting the company from a regular Delaware corporation to a public benefit corporation. *Id.* Before the vote of the shareholders on the reorganization, the directors informed the shareholders that the board was in the process of exploring strategic alternatives, including selling the company because of CEO Bissinger's retirement. *Mem.Op. 9.* The directors informed the shareholders that reorganization would afford the directors greater legal flexibility in the sale of the company, taking into account the maximization of shareholders financial wealth and Mennonite values. *Id.* The reorganization merger passed on September 30, 2013 by a stockholder vote of over 90%, as required by Delaware statute. *Id.*

After the reorganization, named appellant Francis Pennock concluded that he could assemble a bid worth a price north of \$40 without the possibility of expansion into combat based video games. *Id.* At this point, Pennock and Miller Price formed New Hope Corporation. Miller Price is a limited partnership who engages in venture capital investments that produce profits along with balancing of religious values. *Mem. Op. 6.* New Hopes ownership divided the corporation into three parts, a 40% share to Isaac Miller, a 40% share to Stephen Price and a 20% share to Francis Pennock. *Id.* Stephen

Price, an owner of 40% of the New Hope is not a member of the Church and has no affiliation with the Church other than through his business partners, who are members of the Church. *Id.*

At this point the directors of Praise Video, minus Pennock who was abstaining for the merger, directed Stoltzfus to have all potential bidders submit their best offer by the close of business on December 5, 2013. *Mem.Op. 9.* On that date Mercer and New Hope were the only two companies to make a bid. *Id.* Mercer offered \$50 per share and New Hope offered \$41 per share. *Id.* Both of the bids were fully financed, demanded a standard no-shop commitment, proposed a 3% termination fee and were conditioned on the approval of the Praise Video shareholders. *Id.* However, New Hope added another condition to its bid, that Praise Video must grant a "gaming option" allowing New Hope to acquire Praise Video's gaming division for \$18 million, payable in 5-year installments if the New Hope merger failed to gain the necessary stockholder approval. *Mem. Op. 10.* The gaming option would come into effect if the New Hope merger failed or if within twelve months of the termination of the New Hope offer Praise Video is acquired or enters into an agreement to be acquired *.Id.*

New Hope put in this condition because it knew that it would not be able to outbid Mercer, however they wanted something that would keep them in contention for the acquisition. Along with the gaming option, New Hope stated that Pennock would become the CEO of Praise Video. *Id.* The exercise price of the gaming option as stated in the bid is about \$12 million. *Id.* The gaming division is valued at \$30

million, which results in a \$12 difference per share if the option is exercised. *Id.*

After receiving all of the bids the directors met on December 9, 2013 and reviewed the background of the bidding process, each of the bids and any option for further shopping the company. *Mem.Op. 11.* The directors concluded that the company had been shopped exhaustively and none of the directors lacked any informational basis. *Id.* The conversation then shifted to the difference between the prices of the two bids and the director's ability to promote the public benefit set forth in the incorporation of Praise Video. *Id.*

Directors Bissinger and Metcalf were very vocal in their concern about the possibility that after Mercer acquired Praise Video they would expand the gaming operations into combat oriented games. *Id.* They feared that being a wholly-owned subsidiary of a secular company would impact Mercer, despite the fact their stated mission was one of religious integrity. *Id.* Bissinger, one of the most influential people in the company, would not consider Mercer because of the possibility of combat video games. *Id.* He stated that he could not support a merger with Mercer regardless of the difference in price with New Hope because of the possibility of the combat oriented video games. *Mem. Op. 12.* Also, the directors acknowledged the undervaluation of the gaming division but felt that it would strengthen the shareholders vote for the New Hope merger because the possibility of the low exercise price, even if some shareholders would have preferred the Mercer bid. *Id.* The directors voted on the merger and decided by a vote of 4 to 1 to approve the New Hope bid because it

created a balance of pecuniary interests, interests of those materially affected by the companies conduct and the public benefit. *Mem. Op. 11.* The preliminary injunction for appellee was granted before the shareholder vote took place and the shareholder vote was pushed back until March 31, 2014. *Mem. Op. 12.*

Argument

I. THE PRELIMINARY INJUNCTION WAS APPROPRAITE BECAUSE THE GAMING OPTION THWARTED THE SHAREHOLDER VOTE AND THE BOARD BREACHED THEIR FIDUCIARY DUTIES FAILING TO PROVIDE A COMPELLING JUSTIFICATION FOR THE ACTION.

a. Question Presented

i. Whether, under Delaware law, a corporation's board of directors breaches its fiduciary duties when it approves an exercisable "crown jewel" option, in the process of selling the entire company?

b. Scope of Review

i. This is an appeal from the Delaware Court of Chancery's preliminary injunction order in favor of Mercer. The Delaware Supreme Court will review the grant or denial of a preliminary injunction for abuse of discretion with respect to the facts or applicable law. *Kaiser Aluminum Corp. V. Matheson*, 681 A.2d 392, 394 (Del. 1996). The Delaware Court of Chancery's conclusions of law on directors' fiduciary duties and the validity of an exculpatory provision in the company's certificate of incorporation are reviewed *de novo*. Although the Supreme Court might reach different conclusions, if the findings of the Chancellor are supported by the record and are the result of orderly and logical deductive reasoning process, the Supreme Court will accept the findings. *Mills Acquisition Co. v. Macmillian, Inc.*, 559 A.2d 1261, 1278 (Del. 1989).

c. **Merits of Argument**

i. **Praise Video's Board of Director's Decision to Grant the Gaming Option Thwarted Stockholders of Their Right to Vote, Triggering the *Blasius* Standard of Judicial Review.**

The protection of stockholder voting rights is a cornerstone in the context of corporate governance in Delaware corporate law.

Chancellor Allen's opinion in *Blasius Industries, Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988), provides guidance when stockholder's franchise rights are interfered with for improper purposes. *Portnoy v. Cyro-Cell Int'l, Inc.*, 940 A.2d 43 (Del. Ch. 2008). When a board acts for the "primary purpose of thwarting" the exercise of the shareholder franchise, it is not entitled to the protection of the business judgment rule, and instead must provide a compelling justification for its action under an enhanced standard of review. *Blasius*, 564 A.2d 651, 661-662 (Del. Ch. 1988).

In *Blasius Industries*, the Delaware Court of Chancery held that enhanced scrutiny, not the business judgment rule, applied to director action that has the primary purpose of interfering with the exercise of shareholder voting rights. *Blasius*, 564 A.2d. at 651 (Del. Ch. 1988). The Court found that deferential treatment under the business judgment rule was wholly inapplicable to the actions of the board based on the agency-principal relationship between directors and stockholders, and the potential imbalance of power that results when boards intentionally disenfranchise stockholders. *Id.* at 660. The stockholders were not given the "full and fair" opportunity to vote. *Stroud v. Grace*, 606 A.2d 75, 92 (Del.1992).

A breach of the director's fiduciary duties occurs when the directors interfere with the stockholder's right to vote, even if

acting in good faith, unless the directors have a compelling justification. The duty of loyalty has been generally described as mandating "that the best interest of the corporation and its shareholders takes precedent over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally." *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993). By approving the Gaming Option, the Praise Video board of directors thwarted the shareholders of their statutory right to vote on mergers as defined in Section 251(c) of the Delaware General Corporation Law and triggered the higher standard of review derived from *Blasius*.

In *Blasius*, the Court of Chancery considered the decision of the board of directors to attempt to thwart the shareholder vote by expanding the number of directors, which effectively would prevent the solicitation of the largest shareholder to gain control of the board. *Blasius*, 564 A.2d. at 657-658 (Del. Ch. 1988). The Court balanced the consideration of the board acting in good faith to avoid potential financial harm to the corporation and its stockholders against the end result of thwarting the ability of the stockholders to elect a new board of directors. Michael Tumas and Michael Kelly, Rethinking the Blasius Standard of Review: The Implications of Mercer v. Inter-Tel (Delaware), Inc. (2008), <http://www.potteranderson.com/uploads/90/doc/Rethinking%20the%20Blasius%20Standard%20of%20Reveiw00.pdf>.

Although the Court of Chancery found that the board had acted with good faith and care, the board had acted primarily to thwart the exercise of the shareholder vote. *Blasius*, 564 A.2d. at 663 (Del. Ch.

1988). Since the board could not offer a compelling purpose for its actions, the court held that the directors had committed an “unintended violation of the duty of loyalty” while acting outside the scope of their authority. *Id.*

Further supporting that *Blasius* is the proper standard of review, Vice Chancellor Lamb recognized that *Blasius* is not limited to cases that involve director elections, he stated that it should only be applied outside of that context “in circumstances in which self-interested or faithless fiduciaries act to deprive stockholders of a full and fair opportunity to participate in the matter and to thwart what appears to be the will of a majority of stockholders.” *In re MONY Group, Inc. Shareholder Litigation* 853 A.2d 661, 674 (Del. Ch. 2004).

In *Chesapeake Corporation v. Shore*, the defendant board implemented a series of bylaw amendments that included a supermajority provision, which made it “mathematically impossible” for a proxy contest to succeed without the support of the management. In essence, it made the stockholder’s vote useless. *Chesapeake Corporation v. Shore*, 771 A.2d 293, 308-309 (Del. Ch. 2000). The Court concluded that under the *Blasius* test, the primary purpose of the supermajority amendment was to disenfranchise stockholders, and that the defendant’s board had failed to offer a compelling justification for its actions. *Chesapeake Corporation*, 771 A.2d 293 (Del. Ch. 2000). The Court also noted the difficulty of distinguishing between actions done in good faith and those with the purpose of precluding the legitimate exercise of stockholder rights. *Chesapeake Corporation*, 771 A.2d 293, 320 (Del. Ch. 2000).

In *Blasius*, the Court established the analysis to determine whether a board's action violated established principles by disfranchising stockholders. The Court considered, but rejected, a *per se* rule invalidating all board actions taken for the primary purpose of impeding stockholders' franchise rights. *Blasius*, 564 A.2d. at 660-662 (Del. Ch. 1988). Although this *per se* rule was rejected, its consideration alone provides insight to the Court's aversion to board actions thwarting stockholder vote.

Although the record represents that the board intended to take a similar balancing approach with the Mennonite values, the financial harm that would be imposed on the shareholders if they were to vote for the merger with Mercer and not New Hope would be too detrimental to show any true balancing act occurred. Mem. Op. 10. The balancing of the Mennonite values with the interest of the shareholders did not exist, thwarting the shareholder vote.

The *Blasius* doctrine applies in two categories of board action, one of which is when the board takes action for the primary purpose of thwarting a vote on a transaction which shareholders as a matter of corporate law are entitled to vote. *State of Wisconsin Investment Bd. v. Peerless Corp.* 2000 WL 1805376 (Del. Ch. 2000). Under the *Blasius* heightened standard of review, when stockholders establish that the primary purpose of the board's action is to "thwart, impede, or interfere" with stockholder's vote, the burden of persuasion shifts to the board to provide a "compelling justification" for its decision to interfere with franchise rights of the stockholder. *Blasius*, 564 A.2d. at 661 (Del. Ch. 1988). The trigger for applying the *Blasius* doctrine

is any board acting primarily to thwart the vote of its shareholders, which is outside the scope of its powers. *Id.* Additionally, only courts can evaluate whether the board has offered a compelling justification. *Id.*

In the recent decision in *MM Companies, Inc. v. Liquid Audio, Inc.*, the Delaware Supreme Court affirmed that when directors faced with a threat to corporate control act with the primary purpose of thwarting the stockholders' franchise rights, the *Blasius* "compelling justification" test must be satisfied before the Court will apply *Unocal's* reasonableness and proportionality test to the board's actions. *MM Companies, Inc. v. Liquid Audio*, 813 A.2d 1118 (Del. 2003) and Michael Tumas and Michael Kelly, Rethinking the *Blasius* Standard of Review: The Implications of *Mercer v. Inter-Tel (Delaware), Inc.* (2008), <http://www.potteranderson.com/uploads/90/doc/Rethinking%20the%20Blasius%20Standard%20of%20Reveiw00.pdf>. *Liquid Auto* reinforces that *Blasius* is the proper standard of judicial review in the instant cases.

Blasius sets forth a simple and demanding two-part duty of loyalty test. *Peerless Corp.* 2000 WL 1805376 (Del. Ch. 20008). Here, the primary purpose prong under the *Blasius* standard of review is met. Absent confessions of improper purpose, the most important evidence of what a board intended to do is often what effects its action have. *Chesapeake Corporation*, 771 A.2d 293, 320 (Del. Ch. 2000). Here, the record represents that the "directors recognized the undervaluation of the Gaming Provision reflected in the exercise price 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 under the circumstances." Mem. Op. 12. The record went as far as showing that "the directors (other than Holbrook and the absent Pennock) viewed this likely effect positively." Mem. Op. 12. As discussed in *Chesapeake*, here, the directors clearly did not act in good faith, but acted to render the shareholder vote useless by not providing them with a viable choice because of the effect of the Gaming Option. There was also self-interest that supports that thwarting the shareholder vote was the primary purpose of the Gaming Option. The record states that Pennock would take over the position as director of Praise New Hope, Inc. Mem. Op. 6. Although Pennock abstained from voting, he took part in all of the process up to that point and organized the New Hope corporation solely to buy Praise Video. Mem. Op. 6. Pennock as the "driving force" behind the formation of New Hope, he even caught the attention of the rest of the board by explaining the ability to create a company to purchase Praise Video. Mem. Op. 6.

In the present case, the board of directors deprived the stockholder's their statutory right to vote on the transaction under Section 251(c) of the Delaware General Corporation Law. The board of director's granted New Hope the Gaming Option, which allowed them to exercise the option to acquire Praise Video's gaming division for \$18 million. Mem. Op. 10. The condition of the Gaming Option rested on the New Hope merger failing to gain the necessary Praise Video stockholder approval, or within 12 months if Praise Video is acquired or enters into an agreement to be acquired with New Hope or any other entity.

Mem. Op. 10. The Gaming Option was undervalued by almost \$6 million dollars, 40% below the actual value of the gaming division. Mem. Op. 10. The board recognized that the Praise Video stockholder's would individually have preferred Mercer's higher cash bid but would most likely vote in favor of New Hope based on the undervaluation of the Gaming Option. Mem. Op. 12. The stockholder's right to a voluntary vote was thwarted by the board's agreement to such a drastic undervaluation of the Gaming Option.

The recent case *Mercier v. Inter-Tel (Delaware) Inc.*, was a rare occurrence of the Court finding that a "compelling justification" by the board was present. It is important to view the facts of this case in comparison with the present facts. *Mercier v. Inter-Tel (Delaware) Inc.*, 929 A.2d 786 (Del. Ch. 2007). In *Inter-Tel*, Chancellor Strine articulated that the special committee postponed a shareholder meeting to vote on an acquisition proposal, which was made on the day of the meeting. *Inter-Tel*, 929 A.2d 786 (Del. Ch. 2007). This decision to impede the shareholder vote met the compelling justification standard because they were certain the shareholders would vote against the proposal that was in the best interest of the shareholders. *Id.* The shareholders voted to approve the merger based on the new information they gained after the new proposal was more available. *Id.*

This is distinguishable from the present facts and exemplifies the difference of the board acting disinterested under valid authority, which meets the "compelling justification" prong and the situation at hand here where the board is acting to manipulate the electoral process. Tumas and Kelly, Rethinking the *Blasius* Standard of

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(2008). In the present case, the board of directors made statements that inherently show there was no compelling justification to benefit the shareholders and corporation for the thwarting of shareholder voting rights as present in *Inter-tel*. The record represents that the "directors recognized the undervaluation of the Gaming Provision reflected in the exercise price 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 under the circumstances." Mem. Op. 12. As stated previously, the record went as far as showing that "the directors (other than Holbrook and the absent Pennock) viewed this likely effect positively." Mem. Op. 10. The directors clearly acted to make the shareholder vote useless by not providing them with a viable option because of the effect of the Gaming Option. This thwart of the shareholder vote without a compelling justification for the action was a breach of the director's fiduciary duty.

Although this recent decision in *Inter-Tel* foreshadowed the potential limitation for *Blasius*, it still continues as the default rule when corporations thwart the shareholder vote without a compelling justification, displayed in the actions by the board of directors.

The Praise Video board of directors thwarted the stockholder's statutory right to vote by depriving them of their voluntary vote when they approved the Gaming Option. The board of directors was not only aware their action would impede the stockholder vote, but their

acknowledgement also shows they intended the result. Mem. Op. 10. Because there was no compelling justification to thwart the stockholder vote on the merger, the board of director's action breached their fiduciary duties, failing the *Blasius* standard of review. *Blasius*, 564 A.2d 651 (Del. Ch. 1988).

Even if this Court finds that *Blasius* is not the appropriate standard, Mercer prevails under the alternative hybrid *Blasius* and *Unocal* standard of review or the *Unocal* reasonableness test.

ii. If This Court Does Not Apply the Blasius Standard of Judicial Review, the Grant of the Gaming Provision Still Breaches the Praise Board of Director's Fiduciary Duties Under a Lower Standard of Review.

The Court in *Unocal* provides an objective standard to evaluate a board's actions. The first of the two-part test asks whether the board's perception of a threat was reasonable, and the second part asks if the board's response was reasonable in relation to the threat perceived. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985). However, *Unocal* may be used as its own analysis, or in a hybrid standard of review that has come to light in recent case law. Under both the hybrid approach, and *Unocal* on its face, the board of directors breached their fiduciary duties.

In *MM Companies, Inc. v. Liquid Auto, Inc.*, the Delaware Supreme Court debated the use of the *Blasius* and *Unocal* standard of review and found that *Blasius* and *Unocal* standards are "not mutually exclusive." 813 A.2d 1118, 1130 (Del. 2003). The Court suggested in cases where a board's defensive action has the effect of impeding stockholder voting rights, before the Court may consider whether the board's response was reasonable and proportionate under *Unocal*, the board must *first*

present a compelling justification for its actions. *Liquid Auto, Inc.*, 813 A.2d at 1130 (Del. 2003). This ruling confirmed that *Blasius* is the appropriate standard of review under the present facts, with *Unocal* being in the alternative. However, if the court found a compelling justification and *Unocal* was the standard of review, the Praise Video board of director's decision to grant the Gaming Option still fails.

The hybrid standard that is derived from *Unocal* and manipulated throughout case law is outlined in the recent decision in *Inter-Tel* and accepted in the application of review to stockholder votes on mergers. *Inter-Tel*, 929 A.2d 786, 812 (Del. Ch. 2007). This enhanced business judgment rule standard demands that the directors first identify a legitimate corporate objective served by its decision in question. *Inter-Tel*, 929 A.2d 786, 810 (Del. Ch. 2007). In addition to meeting that burden, the directors also bear the burden of persuasion to show that their motivations were proper and not selfishness. *Id.* To ultimately prevail, the directors must show their actions were reasonable in relation to their legitimate objective, and did not preclude stockholders from exercising their right to vote or coerce them into voting a particular way. *Id.*

The analysis of whether the board's actions were to thwart the shareholder vote begins with the determination of whether or not the board has a "legitimate corporate objective" served by its decision to approve the Gaming Option. *Inter-Tel*, 929 A.2d 786, 810 (Del. Ch. 2007). In cases such as *Inter-Tel*, the court has found this prong met when there is the need for more information, or the shareholders are

misinformed and may vote down a merger that would have a detrimental effect on the corporation. *In re MONY*, 853 A.2d 661 (Del. Ch. 2004).

Here, the director's approval of the Gaming Option fails the first prong for numerous reasons. The record reflects that New Hope accepted Pennock (a board member), to be the CEO of Praise Video following the acquisition as support of the Gaming Option. Mem. Op. 6. This sheds light on the Gaming Option having influence outside of "legitimate corporate objectives," as it appears that this decision was based on potential self-dealing influences, violating fiduciary duties. Mem. Op. 10. It was also stated that Pennock would be able to operate Praise Video in the best of his abilities consistently with the values of the Church. Mem. Op. 10. Although this is one of three balancing considerations, this is not to be the only factor weighed by the corporate objectives, which is apparent of the board. In further support that the Gaming Option was not decided with "legitimate corporate objectives" in mind, one of the directors voiced that he would not vote for the "merger with Mercer regardless of the difference between the Mercer and New Hope bid prices." Mem. Op. 12. The recognition of the effect that the Gaming Option being so heavily undervalued would have on the stockholders further supports that there was not a "legitimate corporate objective," but one with the director's self-interest and unbalanced objectives weighed most heavily. *Inter-Tel*, 929 A.2d 786, 810 (Del. Ch. 2007). Thus, the directors were prompted by their self-interest rather than any "legitimate corporate objective." *Id.*

Even if the board was able to show a "legitimate corporate objective," it would be unable to pass the burden of persuasion that their motivations were proper and not selfish to coerce stockholders into voting a particular way. *Inter-Tel*, 929 A.2d 786, 810 (Del. Ch. 2007). The statements made by the directors show a clear intent by the board to affect the stockholder vote, to promote the accomplishment of the merger with New Hope.

Even if this Court finds that the hybrid standard of review is not the appropriate standard, Mercer prevails under the alternative *Unocal* reasonableness test. If triggered, the *Unocal* test requires that a board's response satisfy a "two-part" standard of review: (1) that the target board had reasonable grounds for believing that a danger to corporate policy or effectiveness existed, an obligation it satisfies by showing good faith and reasonable investigation; and (2) that its response was reasonable in relationship to the threat posed by the hostile bid derived from *Unocal* is referred to as an "enhanced judicial scrutiny." *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985). The *Unocal* framework is fully adequate to capture the voting franchise concerns as long as the court applies *Unocal* with an eye out for inequitably motivating electoral manipulations or well-intentioned board action that has preclusive or coercive effects. *Liquid Auto, Inc.*, 813 A.2d 1118, 1129 (Del. 2003).

In *Unocal*, this Court held that a board of directors may only try to prevent a take-over where it can be shown there was a threat to corporate policy and the defensive measure was proportional and reasonable given the nature of the threat. *Unocal Corp. v. Mesa*

Petroleum Co., 493 A.2d 946, 955 (Del. 1985). This developed the requirement known as the *Unocal* test, which was modified by later decisions to apply to broader circumstances. The “duty of care” that was described by the Court is implemented to protect shareholders from any source of harm. *Unocal Corp.*, 493 A.2d 946, 955 (Del. 1985). To satisfy the *Unocal* burden, the directors must convince the court that they have not acted for an inequitable purpose, taking under the issues of fiduciary duties and good faith. *Id.*

As framed by *Inter-Tell*, the *Unocal* test requires directors to: (1) identify the proper corporate objectives served by their actions; and (2) justify their actions as reasonable in relationship to those objectives. *Inter-Tel*, 929 A.2d 786, 807 (Del. Ch. 2007). Certain circumstances surrounding board of director conduct suggests shareholder disenfranchisement as visible intended result. Irwin Warren and Bradley Aronstam, Delaware’s Business Judgment Rule and Varying Standards of Judicial Review Assessing Director Conduct in M&A Transactions (2007), http://www.seitzross.com/media/article/12_Canadian%20Institute%20Article.pdf. Some circumstances include a director action having the effect of impeding the ability of stockholders from exercising their electoral power on a matter committed to them by statute and a director action coercing stockholders into accepting an alternative of the directors’ choosing rather than having free choice to vote as they choose also suggest inequity. *Chesapeake Corporation*, 771 A.2d 293, 322-323 (Del. Ch. 2000).

The board of directors will be unable to identify a proper corporate objective served by thwarting the stockholder vote with the approval of the Gaming Option. Even if the Court were to accept the promotion of the values of the religious belief as the primary corporate objective, the board would be unable to justify their actions as reasonable, further failing under the *Unocal* standard of review. The merger agreement with Mercer would have upheld the religious objectives as the articles of incorporation intended, thus, the stockholders should have been provided the option to voluntarily assess the two options and exercise their vote. Mem. Op. 5. The board of directors could take many steps to promote the values of the religious belief without thwarting the statutory right of the stockholders to have a voluntary vote. Holbrook expressed his concern to the board that attempting to dictate how Praise Video should be operated after the sale of the company without other considerations was inappropriate, however, he was disregarded. Mem. Op. 8. The board of directors is unable to satisfy the enhanced scrutiny under *Unocal*, therefore, their defensive measure of approving the Gaming Option which thwarted the stockholder vote should be invalidated.

II. GRANTING OF THE PRELIMINARY INJUNCTION WAS APPROPRAITE BECAUSE PRAISE VIDEO'S BOARD OF DIRECTORS FAILED TO USE THE BALANCING REQUIREMENTS IN DGCL SECTION 365(a) AND THEREFORE THE APPELLEES WILL SUCCEDD ON THE MERITS OF THEIR CLAIM.

a. Question Presented

i. Whether, under Delaware law, directors of a public benefit corporation can ignore aspects of bids in order to take a bid for reasons only related to the public benefit?

b. Scope of Review

i. This is an appeal from the Delaware Court of Chancery's preliminary injunction order in favor of Mercer. The Delaware Supreme Court will review the grant or denial of a preliminary injunction for abuse of discretion with respect to the facts or applicable law. *Kaiser Aluminum Corp. V. Matheson*, 681 A.2d 392, 394 (Del. 1996). The Delaware Court of Chancery's conclusions of law on directors' fiduciary duties and the validity of an exculpatory provision in the company's certificate of incorporation are reviewed de novo. *Mills Acquisition Co. v. Macmillian, Inc.*, 559 A.2d 1261, 1278 (Del. 1989).

c. **Merits of Argument**

i. Praise Video's Board of Director's Decision to Ignore the Higher Bid of Mercer violated the Balancing Requirement of DGCL 365(a).

The actions of directors in Public Benefit Corporations are an issue of first impression for the Court. Under the new Delaware Public Benefit Corporation law, the directors of a public benefit corporation are required to make decisions "in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation." *Del. Code Ann. tit. 8, § 365 (West 2013)*. Here, the directors ignored the offer by Mercer because of the possibility of combat based video games and chose to merge with New Hope and former director Pennock. *Mem. Op. 7,11*. Therefore, they breached their fiduciary duty to the stockholders.

a. Shareholders pecuniary interests were completely ignored in actions taken by the Praise Video Board of Directors.

CEO Bissinger stated at the December board meeting, where the decision was made to grant the New Hope bid, that the possibility of combat simulation video games would be unacceptable and that "he could not support a merger with Mercer regardless of the difference between the Mercer and New Hope bid prices." Mem. Op. 12. This statement goes directly against the fiduciary duty ordered upon Bissinger by the public benefit corporation statutes. Del. Code Ann. tit.8, § 361 et. seq. (West 2013). Bissinger stating that the difference in price was not even taken into consideration shows that no balancing of the shareholders pecuniary interest took place. Therefore, the directors breached the fiduciary duty owed to the shareholders.

This Court has ruled on the duties of directors in situations where a takeover is imminent on previous occasions. In *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.* this Court held that when directors are faced with a forthcoming takeover and the possibility of undervaluation is ruled out the directors are "changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company." *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986). In that case the directors of Revlon had reached a point where the company was openly up for sale and breakup of the company was inevitable. *Id.* They continued to deny the higher bidder the right to buy the company. *Id.* The directors went through with the sale of the company to a lower bidder and were enjoined from completing the transaction because they breached the fiduciary duty they owed to their shareholders. *Id.* at 184-85.

In our present situation Praise Video is in a very similar to Revlon. Absent the new public benefit corporate structure the two situations are almost identical. Therefore, the ruling in Revlon can still be used as a guide to dealing with directors' activities in evaluating the pecuniary interest of shareholders in a public benefit corporation. The directors of Praise Video understood that the company had been thoroughly shopped and that sale of the company was inevitable. Mem. Op. 10,11. If Praise Video were not a public benefit corporation the decision to take the lower bid of New Hope would be a blatant breach of fiduciary duty under Revlon. Nevertheless, under the public benefit corporate statutes, the complete disregard of a higher priced bid is such a large deviation from directors' duties under Revlon that any amount of public benefit balancing factors cannot make up the difference. Completely ignoring the pecuniary interest of shareholders is a blatant breach of the directors' fiduciary duties.

b. *Alternatively, if Bissinger's comments are found to not completely ignore the price difference the directors still fail to use the balancing test set out in DGCL § 365 (a).*

Even if Bissinger's blatant disregard of the price alone does not breach the director fiduciary duty the complete array of facts show that a balancing of all factors did not take place. The directors are charged with balancing interests of shareholders, stakeholders and the specific public benefit identified in the certificate of incorporation and they satisfy their fiduciary duties if the decisions they make are both "informed and disinterested and not such that no person of

ordinary sound judgment would approve.” Del. Code Ann. tit. 8, § 365(a)-(b) (West 2013).

Here, the pecuniary interest of the shareholders was not taken into account, as evidenced by Bissinger’s comment. Likewise, there is no discussion about the impact the decision will have on “those materially affected by the corporation’s conduct.” Id. With the purchase of Praise Video by New Hope there is an effect on all of the employees of the business, the town in which the business is located and of course the Church. With a brand new corporation like New Hope there is a lot of uncertainty surrounding their endeavors. The directors harped on the fact that there was a possibility of combat simulation video games if Mercer acquired Praise Video, even though it had a direct Christian mission. Mem. Op. 7,11. However, there is very little discussion about New Hope having a 40% shareholder who is not a member of the Church. Mem. Op.6. Combining these facts reveals that the directors only balanced their thoughts of what Praise Video should do based on their Mennonite values. The directors discounted the value of Mercer’s Christian values because of the chance of secular influence on combat situation video games. The directors did not act in a manner of balancing interests they acted for the sole concern of their intended public benefit. Thus, these facts show that the directors made a decision that goes against the sound judgment of an ordinary person and breached their fiduciary duty to shareholders.

Conclusion

Therefore, in light of the breach of fiduciary duties in thwarting the vote of shareholder and failing to participate in a balancing of interests the preliminary injunction should be upheld.