

**IN THE SUPREME COURT  
OF THE STATE OF DELAWARE**

PRAISE VIDEO, INC., a Delaware	)	
corporation, JACOB BISSINGER,	)	
FRANCIS PENNOCK, MARK VAN ZANDT	)	
HOWARD METCALF, PETER HORNBERGER,	)	
NEW HOPE PUBLISHING CO., and	)	No. 43, 2014
PRAISE NEW HOPE CORP.	)	
	)	On appeal from
Defendants Below,	)	The Court of
Appellants	)	Chancery of the
v.	)	State of Delaware
	)	
	)	
MERCER CHRISTIAN PUBLISHING CO.	)	C.A. No. 8974-CD
and SUSAN BEARD	)	
Plaintiffs Below,	)	
Appellees	)	

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**APPELLANTS' OPENING BRIEF**

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Appellants

Date Submitted: February 7, 2014

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**NATURE OF PROCEEDINGS**

Plaintiffs below, Mercer Christian Publishing Co. ("Mercer"), and Susan Beard, filed suit in the Court of Chancery on December 13, 2013, against Defendants below, Praise Video, Inc., ("Praise") and certain members of Praise's board of directors, (collectively, "Defendants"), seeking a preliminary injunction on the grounds that Defendants breached their fiduciary duty to Praise's stockholders in accepting a bid made by New Hope Publishing, Co. ("New Hope").

Chancellor Sean Devlin issued an order granting the preliminary injunction on January 15, 2014, enjoining Praise from consummating its merger agreement with New Hope. This decision was based on a finding that Praise's board of directors intentionally deprived their stockholders of their statutorily-mandated right to vote on a merger and to determine for themselves how to vote on a particular transaction. Because his ruling was based on this finding, Chancellor Devlin found it unnecessary to rule on Plaintiffs' additional contention that Praise failed to satisfy the mandatory balancing requirement of Del. Code Ann. tit. 8, § 362(b) (2013).

After the Chancery Court granted Defendants' application for certification of the interlocutory order, and pursuant to Supreme Court Rule 42, Defendants filed a Notice of Appeal from Interlocutory Order on January 22, 2014, with this Court. It was granted the following day, January 23, 2014. Defendants now ask this Court to reverse the Court of Chancery's ruling and find that a preliminary injunction is not warranted because the Plaintiffs have not and cannot prove a probability of success on the merits.

## SUMMARY OF THE ARGUMENT

1. Praise has a corporate interest in promoting religious values by the very nature of the public benefit statute, and appropriately considered the role religion will play in the company post merger because this Court has expanded the *Revlon* duty of maximizing the sale price of a corporation to allow for other factors. Furthermore, with the information reasonably available to the board at the time of the merger, the board properly balanced the pecuniary interests of the stockholders, the interests of those materially affected by the corporation's conduct, and the identified public benefit of promoting religious values. Since the balance was informed and disinterested, the directors are deemed to have satisfied their fiduciary duties.

2. The Chancery Court erred in applying *Blasius*' compelling justification standard to Praise's decision to approve the gaming option, instead of upholding it under *Unocal*'s framework. *Blasius*' standard is rarely applied and is not applicable in the current case because the approval of the gaming option was not a decision that directly dealt with the electoral process and was not primarily motivated by a desire to thwart the shareholder franchise. The *Unocal* analysis is the proper framework to analyze this deal protection device. Praise satisfied this test because the approval of the gaming option did not force the shareholders to vote in a particular way and was a reasonable response to the threat of being left with the sole option of merging with a company, which had characteristics that did not adequately satisfy the considerations the board members were required to consider.

## STATEMENT OF THE FACTS

Old Praise Video ("Old Praise") was a small, family-owned business comprised of a board of directors and 250 stockholders who are almost all themselves members of the Mennonite Church USA or are related by blood or marriage to members of the Church. (Op.3-4). Old Praise was engaged in the production and distribution of filmed and digital entertainment of what its website describes as a wholesome nature and an alternative to violent or sexually offensive entertainment generally offered by secular media. (Op.3-4). Old Praise has enjoyed relatively modest but consistent financial success, with a highly profitable gaming division comprising 60% of the company's profits. (Op.4). In early 2013, Jacob Bissinger, CEO of Old Praise, decided to retire within the year and he began to explore ways to diversify his investments and concluded that he would need to sell his shares. (Op.6). The board then hired financial advisor Norman Stoltzfus to explore possible transactions in which all stockholders would be able to liquidate their investment. (Op.6).

By June, 2013, Mercer, a wholly-owned subsidiary of Mercer Media, a multi-national, secular media conglomerate, whose stock is traded on the New York Stock Exchange, had expressed interest in acquiring Praise for a price just north of \$40 per share. (Op.5). At a tense board meeting, Stoltzfus revealed the possibility that Mercer may expand Praise's gaming division to include combat-oriented video games, which many board members believed is contrary to their Mennonite values. (Op.8). After Samuel Holbrook, a member of the board, expressed concern about the directors' consideration of

Mennonite values and stated that the company should be concerned solely with the highest sales price, the company retained legal counsel to report on Holbrook's assessment. (Op.8). Based upon counsel's report, over 90% of the stockholder base, cognizant of the Delaware benefit corporation statutes, approved the reorganization of Old Praise into Praise Video as a Delaware public benefit corporation ("PBC") under Del. Code Ann. tit. 8, § 361-368 (2013), in order to afford directors the flexibility to consider Mennonite values, as well as wealth maximization. (Op.8-9). Praise's certificate of incorporation identifies Praise's public benefit as religious in nature and "the promotion of the values articulated in the Confession of Faith in a Mennonite perspective." (Op.3).

As the result of Stoltzfus' continued search for potential bidders, Francis Pennock, a member of Praise's board, stated that he could assemble a bid at least equivalent to Mercer's preliminary bid while continuing to operate Praise as it had in the past. (Op.9). In mid-November, Mercer and New Hope submitted bids of \$50 and \$41 per share, respectively. (Op.9). However, New Hope conditioned its bid on an option to acquire Praise's gaming division for \$18 million, 40% below the actual \$30 million value of the division, and also agreed to allow Pennock to be the CEO of New Hope if the merger was successful. (Op.10).

On December 9, 2013, the directors of Praise met to evaluate and determine how to respond to the bids. (Op.10). As Plaintiffs acknowledge, there was nothing material lacking in the directors' informational base. (Op.10). The directors concluded that the company

had been thoroughly shopped and there was no reasonable prospect that any superior bids would be forthcoming. (Op.11). The central controversy was over the significance the directors should accord to the differences between New Hope and Mercer in terms of their ability to promote the public benefit specified by Praise's certificate of incorporation. (Op.11). They expressed misgivings about the potential impact of Mercer Media's ability to alter Mercer's current promotion of biblical values. (Op.11). At the meeting, the directors carefully evaluated the details of each bid with the directors voting 4-1, with Pennock abstaining, to approve the merger with New Hope because it appropriately balanced the stockholders' pecuniary interests, the best interests of those materially affected by Praise's conduct, and the identified public benefit. (Op.11).

In approving the merger, the board stated that the pricing of the gaming option would likely encourage many Praise stockholders to vote in favor of the New Hope merger. (Op.12). Additionally, Bissinger stated that the possibility that Mercer would expand the gaming division to include combat-oriented materials, even with a generally Christian-themed orientation, would be unacceptable in light of Church doctrine, and that he could not support a merger regardless of the bid prices. (Op.12). The stockholder vote on the merger was postponed pending resolution of this matter. (Op.12).

## ARGUMENT

**I. THE COURT OF CHANCERY ERRED IN GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION BECAUSE DEFENDANTS HAVE FULLY SATISFIED THEIR FIDUCIARY DUTIES TO STOCKHOLDERS AND THE CORPORATION UNDER DEL. CODE ANN. TIT. 8, § 362 (2013), THUS ELIMINATING THE POSSIBILITY OF PLAINTIFFS SHOWING A REASONABLE PROBABILITY OF SUCCESS ON THE MERITS.**

### **A. Question Presented**

Whether a public benefit corporation's board of directors satisfies its fiduciary duties to its stockholders when it considers its identified public benefit of the promotion of religious values when evaluating potential mergers, and in doing so, also weighs the pecuniary interest of the stockholders against the interests of those affected by the conduct of the corporation.

### **B. Scope of Review**

The grant of a preliminary injunction is reviewed for abuse of discretion, without deference to the legal conclusions of the lower court. *Kaiser v. Matheson*, 681 A.2d 392, 394 (Del. 1996) (citations omitted). However, the Court of Chancery's legal conclusions are subject to *de novo* review. *Lawson v. Meconi*, 897 A.2d 740, 743 (Del. 2006). Thus, the Court of Chancery's order granting the preliminary injunction is subject to *de novo* review. *Id.*

### **C. Merits of Argument**

Directors are responsible for managing the business and affairs of a corporation. 8 *Del.C.* § 141(a). Specifically, the directors of a PBC need to manage in a manner that balances the appropriate interests. 8 *Del.C.* § 365(a). These general duties of directors continue to apply with the same fervor in the context of a merger *Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985).

The Court of Chancery improperly granted Plaintiffs' motion for a preliminary injunction. The directors of Praise fully satisfied the statutory requirements for directors of a PBC under Del. Code Ann. tit. 8, § 362(a) (2013). More specifically, Defendants' decisions were made 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 identified in its certificate of incorporation." 8 Del.C. § 362(a). This makes a reasonable showing by Plaintiffs of success on the merits improbable.

In order for Plaintiffs to receive a preliminary injunction, it must be demonstrated that there is a reasonable probability of success on the merits, and that some irreparable harm will occur. See *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1340 (Del. 1987) (citations omitted). In the instant case, Defendants concede that if Plaintiffs demonstrate a probability of success on the merits, the injunction is appropriate.

**i. Praise Video has a corporate interest in promoting religious values, and as such, religious values can play a role in the directors' evaluation of bids.**

Praise was reorganized in September, 2013, as a Delaware public benefit corporation. (Op.3). A PBC is defined as:

A for-profit corporation organized under and subject to the requirements of this chapter [8] that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner. 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 of incorporation.

8 Del.C. § 362(a). The statute goes on to define "public benefit" as:

"a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic . . . medical, **religious**, scientific or technological nature.

8 Del.C. § 362(b) (*emphasis added*). Praise appropriately, and in complete compliance with Del. Code Ann. tit. 8, § 362(a)(1)(2013), identified its specific public benefit as "a positive effect of a religious nature . . . and the promotion of the values articulated in the Confession of Faith in a Mennonite Perspective." (Op.3). Thus, the statutory language governing PBCs gives Praise the ability to promote religion.

Furthermore, Plaintiff places undue emphasis on *Conestoga Wood Specialties Corp. V. Secretary of Health and Human Services*, 724 F.3d 377 (3rd Cir. July 26, 2013), to support their argument that for-profit, secular corporations cannot engage in religious exercise. *Conestoga* is currently contested in the United States Supreme Court. Moreover, the *Conestoga* dissent opines that, "there may not be directly supporting case law [for the proposition that for-profit corporations enjoy Free Exercise Rights], but the conclusory assertion that a corporation has no constitutional right to free exercise of religion is also unsupported by any cited authority." *Id.* at 399 (Jordan, J., dissenting) (citation omitted). The application of *Conestoga* is also flawed because Praise is a PBC. Thus, the issue brought forth in *Conestoga* regarding religious for-profit and religious non-profit corporations has no merit in an application to the case at hand. Praise should benefit from the same presumption of free exercise of religion, like non-profits in *Conestoga*, so long as

its identified public benefit is religious.

**ii. This Court has expanded the Revlon duty of maximizing the sale price of a corporation to allow for consideration of other factors in analyzing offers in the context of a merger.**

Even though Praise would essentially cease to exist after the merger, the directors can still consider the religious integrity of the corporation, post merger. When the board of directors recognizes that a corporation is for sale, the directors have a duty to "maximize shareholder value." *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986). Since Praise retained financial adviser Norman Stoltzfus to identify potential bidders and evaluate these bids, Praise initiated active bidding and was therefore subject to *Revlon* duties. (Op.6). The *Revlon* court held that the directors did, in fact, owe a fiduciary duty to maximize the company's value for the benefit of the shareholders by reasonable efforts and had violated that duty. *Id.* However, existing case law gives rise to a broad interpretation of *Revlon* where maximizing shareholder benefits may include considerations other than stock price. *Paramount Commc'ns, Inc. v. Time, Inc.*, 571 A.2d 1140 (Del. 1989).

In *Paramount*, preserving journalistic integrity, post merger, was a pivotal factor considered in choosing to merge with Warner as opposed to Paramount, who was willing to pay a higher price per share. See *Id.* The court held that directors are not required to favor a short-term, shareholder profit over an ongoing long-term corporate plan, as long as there was a reasonable basis to maintain the corporate plan. *Id.* at 1149. The court distinguished *Paramount* from *Revlon* in that the *Revlon* decision concerned a company that only

wanted to sell itself off to the highest bidder, and thus, the only duty owed by the directors at that point was to maximize shareholder profit. *Id.* at 1151. Time was for sale as it moved forward with its long-term plan of preserving its journalistic integrity and culture. See *Id.* This is similar to Praise because it was not simply selling off assets; it wanted to move forward in a way that would not jeopardize its emphasis on the promotion of the Mennonite faith.

This Court allowed Time to consider factors such as the journalistic integrity of the company post-merger with Warner, versus the journalistic integrity post-merger with Paramount. Thus, it logically follows that Praise can consider how their religious ideals and values will be continued, post-merger, with Mercer versus how they will be upheld with New Hope. The religious-oriented conduct of the corporation's business after merger is an appropriate concern to be taken into account by Praise's directors.

**iii. Praise Video's directors properly engaged in the balancing required by Del. Code Ann. tit. 8, § 362(a) (2013).**

Praise's directors properly balanced the pecuniary interests of the stockholders, the interests of those materially affected by the corporation's conduct, and the identified public benefit as required by statute. 8 *Del.C.* § 365(b). This is a case of first impression. There is no pertinent case law governing the analysis of fiduciary duties of directors in a PBC. While the aforementioned *Revlon* duties typically apply to determine whether the directors have acted in accordance with their fiduciary duties, in this case, Del. Code Ann. tit. 8, § 361-369 (2013) governs. The PBC statute does not apply the rigid standard enunciated in *Revlon*, in which the court held the

directors violated their fiduciary duty to stockholders when the lower priced bid was accepted. *Id.* at 181. When the PBC legislation was passed in Delaware, it specifically crafted a balancing test to measure if fiduciary duties of directors have been met.

The non-pecuniary benefits include the stated public benefit that the corporation seeks to promote, and the effect of the corporation on non-shareholders. For the last 40 years, Praise has engaged in the production and distribution of wholesome material, as opposed to violent or sexually offensive material offered by secular media. (Op.3). Currently, their gaming division accounts for 60% of their profits, and the possibility that Mercer would expand the gaming division to include combat oriented games is very troubling to the members of the Mennonite Church. (Op.3). Since the gaming division accounts for much of Praise's profits, this logically leads to the conclusion that many gamers value the religious integrity of Praise. Thus, the directors must, and properly took into account the effect a merger with Mercer would have on these non-stockholders and their decisions to purchase products from Praise, or a company Praise merges with in the future.

The pecuniary interest of the stockholders can properly be determined by an application of *Revlon*. Accordingly, the directors' fiduciary duties are met when the stockholders pecuniary interest have been maximized, usually by accepting the highest bid. *Revlon*, 506 A.2d at 176. However, this Court opined that additional factors related to corporate constituencies could play a role in determining value as long as there is some "rationally related benefit" accruing to the

stockholders. *Id.* Praise's religious oriented concerns about the merger are a justified and appropriate "rationally related benefit" accruing to the stockholders. Praise took the necessary steps to become a PBC. If Praise merely wanted to be subject to stockholder maximization, they would not have reorganized. Consequently, accepting the Mercer Bid, while higher in price, would end up bringing less value to the stockholders because the effect on the consumers would be negative, and the company would stand to lose revenue in the long term if the corporation started selling violent games. Mercer would also likely affect the corporation's stated public benefit in a negative way. As a result, Praise's concern of how the corporation will be operated post merger is a valid consideration in the balancing test.

In *In Re Dollar Thrifty Shareholder Litigation*, 14 A.3d 573, 595 (Del. 2010), the only question for the Court to decide was whether the steps taken by the Board of Directors were reasonable, not whether the court would have suggested a different method for evaluating bids. Although this case does not deal specifically with the fiduciary duties of directors in a PBC, this type of case law can be analogized to the duties of a PBC's board because they still owe a duty to the stockholders in the context of a merger. Directors often face "a unique set of circumstances and must be permitted to chart the interests of their own stockholders without regard to what the court or outsiders would have decided given the same." *Lyondell Chemical Company v. Ryan*, 970 A.2d 235, 242 (Del. 2009). It is not up to this Court to determine how much emphasis was placed on the stated public benefit as long as it was properly balanced with the other factors.

The statute requires a balancing, and one factor is not completely determinative. Consequently, the extra profit created by the merger with Mercer in the short term, does not outweigh the long term benefits of merging with New Hope, which would not expand into the area of combat oriented games, and would still be led by a member of the Mennonite Church.

**a. The directors were both informed and disinterested in their decision-making process and therefore, are deemed to have satisfied their fiduciary duties to the stockholders and the corporation under Del. Code Ann. tit. 8, § 365(b) (2013).**

As evidenced by the aforesaid analysis, the directors of Praise have engaged in a balancing of the statutorily required elements. When directors have properly balanced these factors, they are "deemed to have satisfied their fiduciary duties to the stockholders and the corporation if their decision is both informed and disinterested . . ." 8 Del.C. § 365(b). Therefore, the Court of Chancery's granting the preliminary injunction is in error.

It 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 interest of the company. *Arson v. Lewis*, 473 A.2d 805 (Del. 1984) (overruled on other grounds). The board has a responsibility of considering only the facts that are reasonably available and not out of the board's reasonable reach at the time. *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). Absent a clear abuse of discretion, the courts will respect the directors' decision. See generally *Arson*, 473 A.2d 805. Furthermore, the burden is on the party challenging the board's decision to establish the facts rebutting the presumption. See *Puma v.*

*Marriot*, 283 A.2d 693, 695 (Del. Ch. 1971). From the standpoint of interest, "directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally." See *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971).

The directors of Praise are both informed and disinterested. Stoltzfus identified potential bidders and thoroughly shopped Praise with all information that was reasonably available. (Op.11). Although the board knew that neither bidder would include the current public benefit provision in their new charter, the board did have knowledge of the possibility that Mercer would expand the gaming division to include violent games. (Op.9). The board also knew that Pennock, a Mennonite, would stand to be the CEO if the merger with New Hope occurred. (Op.11). The directors of Praise met on numerous occasions to discuss the various bids, and considered the information presented by both their financial advisor and their independent legal counsel. (Op.8). Although Pennock would appear on both sides of the merger with New Hope, he abstained from voting on the merger. (Op.9). He would receive no additional personal financial benefit from the merger since New Hope's bid was less than Mercer's. The benefit of the company continuing in the hands of a member of the Mennonite church and preserving the gaming division confers the same advantage on the stockholders as it does on Pennock individually. Even more compelling is the fact that Pennock and the stockholders would actually benefit less financially because of New Hope's lower bid price. (Op.9).

Plaintiffs are also concerned that Bissinger's statements during the December 9 board meeting are preventing the board of directors from performing a disinterested balancing of factors. This is addressed in *Revlon*. A main concern of *Revlon* was that the board might make decisions based on personal motives, such as those expressed by Bissinger. *Id.* at 598. However, as previously mentioned, the board may consider factors that will accrue a rationally related benefit upon the stockholders. Bissinger is merely considering the added benefit of a merger with a company that has not expressed interest in expanding the already profitable gaming division into areas that are against Praise's religious values. Moreover, Bissinger does not stand to gain a personal financial benefit from a merger with New Hope. Consequently, the board was informed and disinterested in their decision.

In conclusion, the directors properly balanced all factors in an informed and disinterested manner, and not such that no person of ordinary, sound judgment would approve. The directors of Praise properly maximized the pecuniary interests of the stockholders, both monetarily and religiously, and tried to maintain the interests of those who rely on the corporation's religious-oriented material and video games, while promoting their identified religious benefit at the same time. Since this proper balancing took place, the directors are deemed to have satisfied their fiduciary duties under Del. Code Ann. tit. 8 § 365(b) (2013). Thus, Plaintiffs cannot show a reasonable probability of success on the merits, and the granting of the preliminary injunction by the Court of Chancery was incorrect.

**II. THE CHANCERY COURT ERRED IN APPLYING *BLASIUS*' COMPELLING JUSTIFICATION STANDARD TO THE APPROVAL OF THE GAMING OPTION AND SHOULD INSTEAD UPHOLD IT UNDER A *UNOCAL* ANALYSIS.**

**A. Question Presented**

Whether the Chancery Court erred in applying *Blasius*' "compelling justification" standard to a PBC's board of director's decision to implement a deal protection device in order to consummate a merger with a company they believed better served considerations they were statutorily mandated to consider?

**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 Argument**

This Court should reverse the Chancery Court's judgment, which held that the approval of the gaming option by Praise's board of directors is subject to scrutiny under *Blasius*' compelling justification standard because it is not the proper standard of review to evaluate this decision. Rather, the gaming option should be upheld as valid because it was not coercive and fell within the range of reasonable actions that a board of directors may take in responding to a threat of corporate policy or effectiveness.

**i. *Blasius*' compelling justification standard is the wrong standard of review to evaluate Praise's adoption of the gaming option.**

The compelling justification standard requires directors to provide a compelling justification when the primary purpose of the board's action is to interfere with stockholder's franchise rights. See *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988).

Satisfying *Blasius*' compelling justification standard is "quite onerous." *Williams v. Geier*, 671 A.2d 1368, 1376 (Del. 1996). Indeed, courts have recognized the outcome determinative nature of employing such a standard to a board's actions. *Chesapeake Corp. v. Shore*, 771 A.2d 293, 320 (Del. Ch. 2000); *Stroud v. Grace*, 606 A.2d 75, 90 (Del. 1992). Accordingly, Delaware courts have been cautious in their application of this standard and apply it rarely. *Geier*, at 1376; *In re MONY Grp., Inc. S'holder Litig.*, 853 A.2d 661, 674 (Del. Ch. 2004); *MM Co., Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1130 (Del. 2003).

**a. Praise's adoption of the gaming option was a business decision, which did not have as its primary purpose the interference of the stockholders' franchise rights.**

In *Blasius*, Atlas' board of directors called an "emergency" meeting and amended the corporation's bylaws to increase the number of board members from seven to nine and filled the additional two seats with Atlas appointees. *Blasius*, 564 A.2d at 654-57. The court held that the board of director's principal motivation in expanding the board was to preclude *Blasius* from gaining control of the board. *Id.* at 655. Indeed, some of Atlas' directors even admitted to this purpose. *Id.* at 656. Atlas' actions to prevent the shareholders from creating a majority of new board positions "did not involve the exercise of *the corporation's power* over its property, or with respect to *its rights or obligations*; rather, it involve[d] allocation, between shareholders as a class and the board, of effective power with respect to governance of the corporation." *Id.* at 935 (emphasis in original). Consistent with this reasoning and the standard enunciated by the court, Delaware courts have generally applied *Blasius* in a

narrow set of circumstances: in matters involving the election of directors where the primary purpose of the board's directors is to interfere with the shareholder franchise. *Stroud*, 606 A.2d at 91.

There are numerous instances of Delaware courts refusing to apply *Blasius'* compelling justification standard when a board of directors makes a business decision concerning matters not directly affecting the electoral process of the board, even when such a decision has the incidental effect of interfering with the voting rights of stockholders.<sup>1</sup> Most illustratively, in *Stahl*, the author of *Blasius* declined to apply it as the standard of review when analyzing a stock rights plan because "it does not represent action taken for the primary purpose of interfering with the exercise of the shareholder's right to elect directors." *Stahl v. Apple Bancorp, Inc.*, Del. Ch., C.A. No. 11510, Allen, C. (Aug. 6, 1990) (Mem.Op.) (emphasis added). This statement is strong evidence that the primary reason for applying such a stringent standard in *Blasius* was because that case directly involved the electoral process of the board, and not the incidental effects that decisions outside of that context would have on voting rights. See generally *Blasius*, 564 A.2d 651.

The underlying rationale of these cases is clear: courts will not apply *Blasius'* standard outside of board decisions involving the

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<sup>1</sup> *Stroud v. Grace*, 606 A.2d 75,91 (Del. 1992) (suggesting that *Blasius* applies when a "board[] of directors deliberately employ[s] various legal strategies either to frustrate or completely disenfranchise a shareholder vote," but that more incidental effects should be examined under *Unocal ; Glazer v. Zapata Corp.*, 658 A.2d 176 (Del. Ch. 1993) (stating that *Blasius* "does not ... require that management refrain from issuing voting securities, and thereby diluting the voting strength of insurgent stockholders, during the pendency of a proxy contest, when the issuance legitimately has a primary purpose directed to the management of the corporation and its businesses").

election of directors because it is only in this context that courts can decisively establish that board actions were taken for the *primary* purpose of interfering with the shareholder franchise and justify subjecting these actions to such a high standard of scrutiny.

Here, the approval of the gaming option was not done for the primary purpose of interfering with the stockholder franchise. Even though some of Praise's directors acknowledged that the gaming option may influence the vote of some stockholders, it was not done in the electoral context as in *Blasius* and was merely an incidental effect of the broader balancing test that the directors engaged in. (Op.12).

**ii. The approval of the gaming option is entitled to the deferential analysis of the business judgment rule because the board's actions survive *Unocal* scrutiny.**

*Unocal's* "enhanced business judgment rule" is invoked whenever a board takes "any defensive measures taken in response to some threat to corporate policy and effectiveness which touch upon issues of control." *Gilbert v. El Paso Co.*, 575 A.2d 1131, 1144 (Del. 1990); See *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985). *Omnicare* expanded the scope of *Unocal* to include measures not necessarily taken in a defensive manner when it stated that "deal protection devices are analogous to defensive devices," which are any "measure or combination of measures intended to protect the consummation of a transaction." *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 934 (Del. 2003).

In *Omnicare*, Genesis refused to proceed with negotiations with the target corporation, NCS, unless it had an exclusivity agreement and a lock up in any potential deal. *Omnicare*, 818 A.2d 914. The NCS board then approved a plan that guaranteed the approval of the Genesis

merger: the board would commit to recommend the Genesis transaction to the NCS shareholders, and the majority shareholders agreed to sign voting agreements to vote their shares in favor of the Genesis merger. *Id.* Even though these deal protection devices were proactive rather than defensive, the court still analyzed the validity of these devices under *Unocal*. *Id.*

Likewise, the gaming option, while not granted as a defensive measure, is a similar proactive concession granted to New Hope in order to lure them into the bidding process and help ensure the eventual consummation of a transaction. (Op.10). Thus, *Unocal* is the proper standard of review for analysis of the gaming option.

Under *Unocal*, the board must demonstrate that it had reasonable grounds to believe that a danger to corporate policy and effectiveness existed, and second, that the deal protection device it chose was "reasonable in relation to the threat posed." *Unocal*, 493 A.2d at 955. If both prongs of this test are satisfied, the business judgment rule applies, which states a court will not substitute its judgment for that of a board. *Omnicare*, 818 A.2d at 931; *Unitrin*, 651 A.2d at 1388.

**a. Praise reasonably believed that not approving the gaming option would result in losing the opportunity to merge with New Hope and leave them with the sole alternative of a less desirable merger.**

A board satisfies their burden of proof under the first prong of *Unocal* by showing good faith after conducting a reasonable investigation. *Unocal*, 493 A.2d at 955.

### **1. Reasonable Investigation**

It is undisputed that Praise adopted the gaming option after reasonable investigation. Plaintiffs acknowledged that there was

nothing material lacking in the directors' informational base.

(Op.10). Additionally, Praise relied on their legal counsel, financial advisor, and adequately "shopped" for other bids. (Op.11).

## **2. Corporate Threat**

A lower monetary offer is not the sole threat to corporate policy or effectiveness that satisfies this prong of *Unocal*. *Paramount*, 571 A.2d at 1152-53. Indeed, "[t]he usefulness of *Unocal* as an analytical tool is precisely its flexibility in the face of a variety of fact scenarios." *Id.* at 1153. Notably, as of Spring 2013, forty-seven cases have been decided under *Unocal* and only one has failed this step of the *Unocal* analysis. Mary Siegel, *The Illusion of Enhanced Review of Board Actions*, 15 U. Pa. J. Bus. L. 599, 620 (2013). This evidence, coupled with the *Paramount* court's characterization of the *Unocal* test as a flexible one is strong evidence of the court's deferential judgment in assessing threats to corporate policy and effectiveness. *Paramount*, 571 A.2d at 1152-53.

Here, Praise faced the threat of losing New Hope's bid if it denied the gaming option because New Hope, like Genesis in *Omnicare*, made this condition a requisite to their bid.(Op.10). Denying New Hope this option would result in the sole alternative of the Mercer merger, which Praise did not believe adequately balanced the interests that the board was statutorily mandated to consider. See 8 *Del.C.* § 362(a).

### **b. The gaming option was not coercive because it only influenced the shareholder vote.**

A reasonable deal protection device cannot be coercive or preclusive. *Omnicare*, 818 A.2d at 931. The Plaintiffs do not allege that the gaming option was preclusive in any way. (Op.15). Rather,

they premise their argument on the notion that the gaming option effectively forces a management-sponsored alternative upon them, which is an issue of stockholder coercion. (Op.15). Since the Plaintiff does not allege that the gaming option was preclusive, that aspect of the *Unocal* test will not be addressed.

Coercion exists in the voting context "where the board or some other party takes actions which have the effect of causing the stockholders to vote in favor of the proposed transaction for some reason other than the merits of the transaction." *Omnicare*, 818 A.2d at 935. Ultimately, however, the determination of "whether a particular stockholder vote has been robbed of its effectiveness by impermissible coercion depends on the facts of the case." *Brazen v. Bell Atl. Corp.*, 695 A.2d 43, 50 (Del. 1997).

In *Omnicare*, the court held the stockholders' vote was coerced because the deal protection devices "predetermined the outcome" of the merger. *Omnicare*, 818 A.2d at 936. As discussed previously, the Genesis merger agreement, which provided that the Genesis merger be submitted to a stockholder vote coupled with the voting agreement of the majority stockholders guaranteed the approval of the Genesis merger. *Id.* at 914. In other words, the deal protection devices were coercive because the majority of the votes were forced to be cast a certain way without any voluntary decision by the stockholders.

In *Brazen*, the court held that termination fees, which would be triggered if shareholders voted against a certain merger and impose a financial penalty on their company, did not render the stockholder vote coerced. *Brazen*, 695 A.2d at 46. The court stated that "although

the termination fee provision may have influenced the stockholder vote, there were 'no structurally or situationally coercive factors' that made an otherwise valid fee provision impermissibly coercive in this setting." *Id.* (quoting *Brazen v. Bell Atl. Corp.*, Del. Ch., C.A. No. 14976, slip op. at 14 (Mar. 19, 1997)).

The juxtaposition of these cases brings into clarity that deal protection devices are not rendered coercive simply because they have some influence on the shareholder vote. Rather, to be coercive, the measures must force stockholders to vote a certain way or result in a mathematically certain outcome regardless of the voluntary casting of minority stockholder votes. The present case is controlled by *Brazen* because the gaming option does not force stockholders to vote in a certain way. Rather, the stockholders are aware of the effects of the gaming option and remain free to voluntarily cast their vote in favor of, or against the merger with New Hope after a consideration of the merits of the transaction. Their votes are not rendered ineffective because of a pre-commitment of votes, and retain their full effect consistent with Del. Code Ann. tit. 8, § 251(c) (2013).

**c. The gaming option was a reasonable response to the threat that the Mercer merger posed to Praise's identified public benefit.**

Valid deal protection devices must fall "within a range of reasonableness to the threat perceived." *Omnicare*, 818 A.2d at 935. The borders of this range are defined by the "specific nature of the threat" posed to the corporation. *Versata Enter., Inc. v. Selectica, Inc.*, 5 A.3d 586, 606 (Del. 2010). Thus, context is an important part of this analysis. *Id.* Additionally, in determining whether a board's actions fell within this range, it is important to note that the court

should be deciding whether the directors made **a reasonable** decision, not **a perfect** decision. *Paramount*, 637 A.2d at 45 (emphasis in original).

In this instance, if Praise denied the gaming option, it faced the threat of losing the New Hope merger and being saddled with the Mercer merger as the only alternative. (Op.9, 10). Praise's status as a PBC mandates that its board must take into account, among other things, the values of the Mennonite faith when making business decisions. (Op.3). Not only did Mercer want to expand Praise's gaming division to include violent games, which a portion of the Praise board believed violated their religious beliefs, but the agreeable mission and future direction of Mercer itself was not guaranteed. (Op.5). Mercer is a wholly owned subsidiary of Mercer Media, a large multinational media conglomerate whose stock trades on the New York Stock Exchange. (Op.5). Thus, its agreeable religious mission is subject not only to Mercer Media, but also to anyone who acquires a controlling stake of Mercer Media through public trading of its stock.

Delaware courts have repeatedly recognized that deal protection devices involving the "crown jewels" of companies, are not per se illegal. See *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1286 (Del. 1989); *Revlon* 506 A.2d at 183. Cases examining such deal protection devices were decided before the PBC statutes were promulgated and were premised on achieving maximum share price for shareholders, not on the careful balancing analysis dictated by the PBC statutes. These statutes do not contemplate any hierarchy of the three considerations that directors must consider. See Del. Code Ann.

tit. 8, § 362(a) (2013). Hence, even though the gaming option involved the purchase of Praise's "crown jewel" assets at a discounted price, this is not determinative of the balancing test that Praise's directors had to utilize. Indeed, deal protection devices like the gaming option are historically offered at a discount as an incentive to lure a company into the bidding process. See Brudney & Chirelstein, *Fair Shares in Corporate Mergers and Takeovers*, 88 HARV. L. REV. 297, 297-98 (1974). After taking into account the markedly better adherence to Praise's identified public benefit the New Hope merger offered, it is clear that Praise's approval of the gaming option was a reasonable response to the substantial Mercer threat.

In conclusion, because Praise's approval of the gaming option satisfies *Unocal*, Praise's board is entitled to the deferential business judgment rule. See *Unitrin*, 651 A.2d at 1388. Thus, this Court should reverse the Chancery Court's preliminary injunction, which substituted the judgment of the court for that of the board.

#### **CONCLUSION**

For the foregoing reasons, Defendants respectfully request this Court to reverse the Court of Chancery's grant of preliminary injunction.

Respectfully submitted,

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Team O  
Attorneys for Appellants

**IN THE SUPREME COURT  
OF THE STATE OF DELAWARE**

PRAISE VIDEO, INC., a Delaware	)	
corporation, JACOB BISSINGER,	)	
FRANCIS PENNOCK, MARK VAN ZANDT	)	
HOWARD METCALF, PETER HORNBERGER,	)	
NEW HOPE PUBLISHING CO., and	)	No. 43, 2014
PRAISE NEW HOPE CORP.	)	
	)	
	)	On appeal from
Defendants Below,	)	The Court of
Appellants	)	Chancery of the
v.	)	State of Delaware
	)	
	)	
MERCER CHRISTIAN PUBLISHING CO.	)	C.A. No. 8974-CD
and SUSAN BEARD	)	
	)	
Plaintiffs Below,	)	
Appellees	)	

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**APPENDIX TO APPELLANTS' OPENING BRIEF**

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Filed by Team O  
Attorneys for Defendants-Below,  
Appellants

Date Submitted: February 7, 2014

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**Delaware Code Annotated Title 8, Chapter 1**

Section 251: Merger or Consolidation of Domestic Corporations

(a) Any 2 or more corporations existing under the laws of this State may merge into a single corporation, which may be any 1 of the constituent corporations or may consolidate into a new corporation formed by the consolidation, pursuant to an agreement of merger or consolidation, as the case may be, complying and approved in accordance with this section.

(b) The board of directors of each corporation which desires to merge or consolidate shall adopt a resolution approving an agreement of merger or consolidation and declaring its advisability. The agreement shall state:

- (1) The terms and conditions of the merger or consolidation;
- (2) The mode of carrying the same into effect;
- (3) In the case of a merger, such amendments or changes in the certificate of incorporation of the surviving corporation as are desired to be effected by the merger (which amendments or changes may amend and restate the certificate of incorporation of the surviving corporation in its entirety), or, if no such amendments or changes are desired, a statement that the certificate of incorporation of the surviving corporation shall be its certificate of incorporation;
- (4) In the case of a consolidation, that the certificate of incorporation of the resulting corporation shall be as is set forth in an attachment to the agreement;
- (5) The manner, if any, of converting the shares of each of the constituent corporations into shares or other securities of the corporation surviving or resulting from the merger or consolidation, or of cancelling some or all of such shares, and, if any shares of any of the constituent corporations are not to remain outstanding, to be converted solely into shares or other securities of the surviving or resulting corporation or to be cancelled, the cash, property, rights or securities of any other corporation or entity which the holders of such shares are to receive in exchange for, or upon conversion of such shares and the surrender of any certificates evidencing them, which cash, property, rights or securities of any other corporation or entity may be in addition to or in lieu of shares or other securities of the surviving or resulting corporation; and
- (6) Such other details or provisions as are deemed desirable, including, without limiting the generality of the foregoing, a provision for the payment of cash in lieu of the issuance or recognition of fractional shares, interests or rights, or for any other arrangement with respect thereto, consistent with § 155 of this title.

The agreement so adopted shall be executed and acknowledged in accordance with § 103 of this title. Any of the terms of the agreement of merger or consolidation may be made dependent upon facts ascertainable outside of such agreement, provided that the manner in which such facts shall operate upon the terms of the agreement is clearly and expressly set forth in the agreement of merger or

consolidation. The term "facts," as used in the preceding sentence, includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation.

(c) The agreement required by subsection (b) of this section shall be submitted to the stockholders of each constituent corporation at an annual or special meeting for the purpose of acting on the agreement. Due notice of the time, place and purpose of the meeting shall be mailed to each holder of stock, whether voting or nonvoting, of the corporation at the stockholder's address as it appears on the records of the corporation, at least 20 days prior to the date of the meeting. The notice shall contain a copy of the agreement or a brief summary thereof. At the meeting, the agreement shall be considered and a vote taken for its adoption or rejection. If a majority of the outstanding stock of the corporation entitled to vote thereon shall be voted for the adoption of the agreement, that fact shall be certified on the agreement by the secretary or assistant secretary of the corporation, provided that such certification on the agreement shall not be required if a certificate of merger or consolidation is filed in lieu of filing the agreement. If the agreement shall be so adopted and certified by each constituent corporation, it shall then be filed and shall become effective, in accordance with § 103 of this title. In lieu of filing the agreement of merger or consolidation required by this section, the surviving or resulting corporation may file a certificate of merger or consolidation, executed in accordance with § 103 of this title, which states:

- (1) The name and state of incorporation of each of the constituent corporations;
- (2) That an agreement of merger or consolidation has been approved, adopted, executed and acknowledged by each of the constituent corporations in accordance with this section;
- (3) The name of the surviving or resulting corporation;
- (4) In the case of a merger, such amendments or changes in the certificate of incorporation of the surviving corporation as are desired to be effected by the merger (which amendments or changes may amend and restate the certificate of incorporation of the surviving corporation in its entirety), or, if no such amendments or changes are desired, a statement that the certificate of incorporation of the surviving corporation shall be its certificate of incorporation;
- (5) In the case of a consolidation, that the certificate of incorporation of the resulting corporation shall be as set forth in an attachment to the certificate;
- (6) That the executed agreement of consolidation or merger is on file at an office of the surviving corporation, stating the address thereof; and
- (7) That a copy of the agreement of consolidation or merger will be furnished by the surviving corporation, on request and without cost, to any stockholder of any constituent corporation.

(d) Any agreement of merger or consolidation may contain a provision that at any time prior to the time that the agreement (or a certificate in lieu thereof) filed with the Secretary of State becomes effective in accordance with § 103 of this title, the agreement may be

terminated by the board of directors of any constituent corporation notwithstanding approval of the agreement by the stockholders of all or any of the constituent corporations; in the event the agreement of merger or consolidation is terminated after the filing of the agreement (or a certificate in lieu thereof) with the Secretary of State but before the agreement (or a certificate in lieu thereof) has become effective, a certificate of termination or merger or consolidation shall be filed in accordance with § 103 of this title. Any agreement of merger or consolidation may contain a provision that the boards of directors of the constituent corporations may amend the agreement at any time prior to the time that the agreement (or a certificate in lieu thereof) filed with the Secretary of State becomes effective in accordance with § 103 of this title, provided that an amendment made subsequent to the adoption of the agreement by the stockholders of any constituent corporation shall not (1) alter or change the amount or kind of shares, securities, cash, property and/or rights to be received in exchange for or on conversion of all or any of the shares of any class or series thereof of such constituent corporation, (2) alter or change any term of the certificate of incorporation of the surviving corporation to be effected by the merger or consolidation, or (3) alter or change any of the terms and conditions of the agreement if such alteration or change would adversely affect the holders of any class or series thereof of such constituent corporation; in the event the agreement of merger or consolidation is amended after the filing thereof with the Secretary of State but before the agreement has become effective, a certificate of amendment of merger or consolidation shall be filed in accordance with § 103 of this title.

(e) In the case of a merger, the certificate of incorporation of the surviving corporation shall automatically be amended to the extent, if any, that changes in the certificate of incorporation are set forth in the agreement of merger.

(f) Notwithstanding the requirements of subsection (c) of this section, unless required by its certificate of incorporation, no vote of stockholders of a constituent corporation surviving a merger shall be necessary to authorize a merger if (1) the agreement of merger does not amend in any respect the certificate of incorporation of such constituent corporation, (2) each share of stock of such constituent corporation outstanding immediately prior to the effective date of the merger is to be an identical outstanding or treasury share of the surviving corporation after the effective date of the merger, and (3) either no shares of common stock of the surviving corporation and no shares, securities or obligations convertible into such stock are to be issued or delivered under the plan of merger, or the authorized unissued shares or the treasury shares of common stock of the surviving corporation to be issued or delivered under the plan of merger plus those initially issuable upon conversion of any other shares, securities or obligations to be issued or delivered under such plan do not exceed 20% of the shares of common stock of such constituent corporation outstanding immediately prior to the effective date of the merger. No vote of stockholders of a constituent corporation shall be necessary to authorize a merger or consolidation

if no shares of the stock of such corporation shall have been issued prior to the adoption by the board of directors of the resolution approving the agreement of merger or consolidation. If an agreement of merger is adopted by the constituent corporation surviving the merger, by action of its board of directors and without any vote of its stockholders pursuant to this subsection, the secretary or assistant secretary of that corporation shall certify on the agreement that the agreement has been adopted pursuant to this subsection and, (1) if it has been adopted pursuant to the first sentence of this subsection, that the conditions specified in that sentence have been satisfied, or (2) if it has been adopted pursuant to the second sentence of this subsection, that no shares of stock of such corporation were issued prior to the adoption by the board of directors of the resolution approving the agreement of merger or consolidation, provided that such certification on the agreement shall not be required if a certificate of merger or consolidation is filed in lieu of filing the agreement. The agreement so adopted and certified shall then be filed and shall become effective, in accordance with § 103 of this title. Such filing shall constitute a representation by the person who executes the agreement that the facts stated in the certificate remain true immediately prior to such filing.

(g) Notwithstanding the requirements of subsection (c) of this section, unless expressly required by its certificate of incorporation, no vote of stockholders of a constituent corporation shall be necessary to authorize a merger with or into a single direct or indirect wholly-owned subsidiary of such constituent corporation if: (1) such constituent corporation and the direct or indirect wholly-owned subsidiary of such constituent corporation are the only constituent entities to the merger; (2) each share or fraction of a share of the capital stock of the constituent corporation outstanding immediately prior to the effective time of the merger is converted in the merger into a share or equal fraction of share of capital stock of a holding company having the same designations, rights, powers and preferences, and the qualifications, limitations and restrictions thereof, as the share of stock of the constituent corporation being converted in the merger; (3) the holding company and the constituent corporation are corporations of this State and the direct or indirect wholly-owned subsidiary that is the other constituent entity to the merger is a corporation or limited liability company of this State; (4) the certificate of incorporation and by-laws of the holding company immediately following the effective time of the merger contain provisions identical to the certificate of incorporation and by-laws of the constituent corporation immediately prior to the effective time of the merger (other than provisions, if any, regarding the incorporator or incorporators, the corporate name, the registered office and agent, the initial board of directors and the initial subscribers for shares and such provisions contained in any amendment to the certificate of incorporation as were necessary to effect a change, exchange, reclassification, subdivision, combination or cancellation of stock, if such change, exchange, reclassification, subdivision, combination, or cancellation has become effective); (5) as a result of the merger the constituent corporation or its successor

becomes or remains a direct or indirect wholly-owned subsidiary of the holding company; (6) the directors of the constituent corporation become or remain the directors of the holding company upon the effective time of the merger; (7) the organizational documents of the surviving entity immediately following the effective time of the merger contain provisions identical to the certificate of incorporation of the constituent corporation immediately prior to the effective time of the merger (other than provisions, if any, regarding the incorporator or incorporators, the corporate or entity name, the registered office and agent, the initial board of directors and the initial subscribers for shares, references to members rather than stockholders or shareholders, references to interests, units or the like rather than stock or shares, references to managers, managing members or other members of the governing body rather than directors and such provisions contained in any amendment to the certificate of incorporation as were necessary to effect a change, exchange, reclassification, subdivision, combination or cancellation of stock, if such change, exchange, reclassification, subdivision, combination or cancellation has become effective); provided, however, that (i) if the organizational documents of the surviving entity do not contain the following provisions, they shall be amended in the merger to contain provisions requiring that (A) any act or transaction by or involving the surviving entity, other than the election or removal of directors or managers, managing members or other members of the governing body of the surviving entity, that requires for its adoption under this chapter or its organizational documents the approval of the stockholders or members of the surviving entity shall, by specific reference to this subsection, require, in addition, the approval of the stockholders of the holding company (or any successor by merger), by the same vote as is required by this chapter and/or by the organizational documents of the surviving entity; provided, however, that for purposes of this clause (i)(A), any surviving entity that is not a corporation shall include in such amendment a requirement that the approval of the stockholders of the holding company be obtained for any act or transaction by or involving the surviving entity, other than the election or removal of directors or managers, managing members or other members of the governing body of the surviving entity, which would require the approval of the stockholders of the surviving entity if the surviving entity were a corporation subject to this chapter; (B) any amendment of the organizational documents of a surviving entity that is not a corporation, which amendment would, if adopted by a corporation subject to this chapter, be required to be included in the certificate of incorporation of such corporation, shall, by specific reference to this subsection, require, in addition, the approval of the stockholders of the holding company (or any successor by merger), by the same vote as is required by this chapter and/or by the organizational documents of the surviving entity; and (C) the business and affairs of a surviving entity that is not a corporation shall be managed by or under the direction of a board of directors, board of managers or other governing body consisting of individuals who are subject to the same fiduciary duties applicable to, and who are liable for breach of such duties to the same extent

as, directors of a corporation subject to this chapter; and (ii) the organizational documents of the surviving entity may be amended in the merger (A) to reduce the number of classes and shares of capital stock or other equity interests or units that the surviving entity is authorized to issue and (B) to eliminate any provision authorized by § 141(d) of this title; and (8) the stockholders of the constituent corporation do not recognize gain or loss for United States federal income tax purposes as determined by the board of directors of the constituent corporation. Neither paragraph (g)(7)(i) of this section nor any provision of a surviving entity's organizational documents required by paragraph (g)(7)(i) of this section shall be deemed or construed to require approval of the stockholders of the holding company to elect or remove directors or managers, managing members or other members of the governing body of the surviving entity. The term "organizational documents", as used in paragraph (g)(7) of this section and in the preceding sentence, shall, when used in reference to a corporation, mean the certificate of incorporation of such corporation, and when used in reference to a limited liability company, mean the limited liability company agreement of such limited liability company.

As used in this subsection only, the term "holding company" means a corporation which, from its incorporation until consummation of a merger governed by this subsection, was at all times a direct or indirect wholly-owned subsidiary of the constituent corporation and whose capital stock is issued in such merger. From and after the effective time of a merger adopted by a constituent corporation by action of its board of directors and without any vote of stockholders pursuant to this subsection: (i) to the extent the restrictions of § 203 of this title applied to the constituent corporation and its stockholders at the effective time of the merger, such restrictions shall apply to the holding company and its stockholders immediately after the effective time of the merger as though it were the constituent corporation, and all shares of stock of the holding company acquired in the merger shall for purposes of § 203 of this title be deemed to have been acquired at the time that the shares of stock of the constituent corporation converted in the merger were acquired, and provided further that any stockholder who immediately prior to the effective time of the merger was not an interested stockholder within the meaning of § 203 of this title shall not solely by reason of the merger become an interested stockholder of the holding company, (ii) if the corporate name of the holding company immediately following the effective time of the merger is the same as the corporate name of the constituent corporation immediately prior to the effective time of the merger, the shares of capital stock of the holding company into which the shares of capital stock of the constituent corporation are converted in the merger shall be represented by the stock certificates that previously represented shares of capital stock of the constituent corporation and (iii) to the extent a stockholder of the constituent corporation immediately prior to the merger had standing to institute or maintain derivative litigation on behalf of the constituent corporation, nothing in this section shall be deemed to limit or extinguish such standing. If an

agreement of merger is adopted by a constituent corporation by action of its board of directors and without any vote of stockholders pursuant to this subsection, the secretary or assistant secretary of the constituent corporation shall certify on the agreement that the agreement has been adopted pursuant to this subsection and that the conditions specified in the first sentence of this subsection have been satisfied, provided that such certification on the agreement shall not be required if a certificate of merger or consolidation is filed in lieu of filing the agreement. The agreement so adopted and certified shall then be filed and become effective, in accordance with § 103 of this title. Such filing shall constitute a representation by the person who executes the agreement that the facts stated in the certificate remain true immediately prior to such filing.

(h) Notwithstanding the requirements of subsection (c) of this section, unless expressly required by its certificate of incorporation, no vote of stockholders of a constituent corporation whose shares are listed on a national securities exchange or held of record by more than 2,000 holders immediately prior to the execution of the agreement of merger by such constituent corporation shall be necessary to authorize a merger if:

(1) The agreement of merger, which must be entered into on or after August 1, 2013, expressly provides that such merger shall be governed by this subsection and shall be effected as soon as practicable following the consummation of the offer referred to in paragraph

(h)(2) of this section;

(2) A corporation consummates a tender or exchange offer for any and all of the outstanding stock of such constituent corporation on the terms provided in such agreement of merger that, absent this subsection, would be entitled to vote on the adoption or rejection of the agreement of merger;

(3) Following the consummation of such offer, the consummating corporation owns at least such percentage of the stock, and of each class or series thereof, of such constituent corporation that, absent this subsection, would be required to adopt the agreement of merger by this chapter and by the certificate of incorporation of such constituent corporation;

(4) At the time such constituent corporation's board of directors approves the agreement of merger, no other party to such agreement is an "interested stockholder" (as defined in § 203(c) of this title) of such constituent corporation;

(5) The corporation consummating the offer described in paragraph (h)(2) of this section merges with or into such constituent corporation pursuant to such agreement; and

(6) The outstanding shares of each class or series of stock of the constituent corporation not to be canceled in the merger are to be converted in such merger into, or into the right to receive, the same amount and kind of cash, property, rights or securities paid for shares of such class or series of stock of such constituent corporation upon consummation of the offer referred to in paragraph (h)(2) of this section.

If an agreement of merger is adopted without the vote of stockholders of a corporation pursuant to this subsection, the secretary or

assistant secretary of the surviving corporation shall certify on the agreement that the agreement has been adopted pursuant to this subsection and that the conditions specified in this subsection (other than the condition listed in paragraph (h) (5) of this section) have been satisfied; provided that such certification on the agreement shall not be required if a certificate of merger is filed in lieu of filing the agreement. The agreement so adopted and certified shall then be filed and shall become effective, in accordance with § 103 of this title. Such filing shall constitute a representation by the person who executes the agreement that the facts stated in the certificate remain true immediately prior to such filing.

#### Section 361: Law applicable to public benefit corporations; how formed

This subchapter applies to all public benefit corporations, as defined in § 362 of this title. If a corporation elects to become a public benefit corporation under this subchapter in the manner prescribed in this subchapter, it shall be subject in all respects to the provisions of this chapter, except to the extent this subchapter imposes additional or different requirements, in which case such requirements shall apply.

#### Section 362: Public benefit corporation defined, contents of certificate of incorporation

(a) A "public benefit corporation" is a for-profit corporation organized under and subject to the requirements of this chapter that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner. 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 of incorporation. In the certificate of incorporation, a public benefit corporation shall:

(1) Identify within its statement of business or purpose pursuant to § 102(a) (3) of this title 1 or more specific public benefits to be promoted by the corporation; and

(2) State within its heading that it is a public benefit corporation.

(b) "Public benefit" means a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature. "Public benefit provisions" means the provisions of a certificate of incorporation contemplated by this subchapter.

(c) The name of the public benefit corporation shall, without exception, contain the words "public benefit corporation," or the abbreviation "P.B.C.," or the designation "PBC," which shall be deemed to satisfy the requirements of § 102(a) (1) (i) of this title.

Section 363: Certain amendments and mergers; votes required; appraisal rights

(a) Notwithstanding any other provisions of this chapter, a corporation that is not a public benefit corporation, may not, without the approval of 90% of the outstanding shares of each class of the stock of the corporation of which there are outstanding shares, whether voting or nonvoting:

(1) Amend its certificate of incorporation to include a provision authorized by § 362(a)(1) of this title; or

(2) Merge or consolidate with or into another entity if, as a result of such merger or consolidation, the shares in such corporation would become, or be converted into or exchanged for the right to receive, shares or other equity interests in a domestic or foreign public benefit corporation or similar entity.

The restrictions of this section shall not apply prior to the time that the corporation has received payment for any of its capital stock, or in the case of a nonstock corporation, prior to the time that it has members.

(b) Any stockholder of a corporation that is not a public benefit corporation that holds shares of stock of such corporation immediately prior to the effective time of:

(1) An amendment to the corporation's certificate of incorporation to include a provision authorized by § 362(a)(1) of this title; or

(2) A merger or consolidation that would result in the conversion of the corporation's stock into or exchange of the corporation's stock for the right to receive shares or other equity interests in a domestic or foreign public benefit corporation or similar entity; and has neither voted in favor of such amendment or such merger or consolidation nor consented thereto in writing pursuant to § 228 of this title, shall be entitled to an appraisal by the Court of Chancery of the fair value of the stockholder's shares of stock.

(c) Notwithstanding any other provisions of this chapter, a corporation that is a public benefit corporation may not, without the approval of  $\frac{2}{3}$  of the outstanding shares of each class of the stock of the corporation of which there are outstanding shares, whether voting or nonvoting:

(1) Amend its certificate of incorporation to delete or amend a provision authorized by § 362(a)(1) or § 366(c) of this title; or

(2) Merge or consolidate with or into another entity if, as a result of such merger or consolidation, the shares in such corporation would become, or be converted into or exchanged for the right to receive, shares or other equity interests in a domestic or foreign corporation that is not a public benefit corporation or similar entity and the certificate of incorporation (or similar governing instrument) of which does not contain the identical provisions identifying the public benefit or public benefits pursuant to § 362(a) of this title or imposing requirements pursuant to § 366(c) of this title.

(d) Notwithstanding the foregoing, a nonprofit nonstock corporation may not be a constituent corporation to any merger or consolidation governed by this section.

Section 364: Stock certificates; notice regarding uncertified stock

Any stock certificate issued by a public benefit corporation shall note conspicuously that the corporation is a public benefit corporation formed pursuant to this subchapter. Any notice sent by a public benefit corporation pursuant to § 151(f) of this title shall state conspicuously that the corporation is a public benefit corporation formed pursuant to this subchapter.

Section 365: Duties of Directors

(a) The board of directors shall manage or direct the business and affairs of the public benefit corporation 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.

(b) A director of a public benefit corporation shall not, by virtue of the public benefit provisions or § 362(a) of this title, have any duty to any person on account of any interest of such person in the public benefit or public benefits identified in the certificate of incorporation or on account of any interest materially affected by the corporation's conduct and, with respect to a decision implicating the balance requirement in subsection (a) of this section, 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.

(c) The certificate of incorporation of a public benefit corporation may include a provision that any disinterested failure to satisfy this section shall not, for the purposes of § 102(b)(7) or § 145 of this title, constitute an act or omission not in good faith, or a breach of the duty of loyalty.

Section 366: Periodic statements and third-party certification

(a) A public benefit corporation shall include in every notice of a meeting of stockholders a statement to the effect that it is a public benefit corporation formed pursuant to this subchapter.

(b) A public benefit corporation shall no less than biennially provide its stockholders with a statement as to the corporation's promotion of the public benefit or public benefits identified in the certificate of incorporation and of the best interests of those materially affected by the corporation's conduct. The statement shall include:

(1) The objectives the board of directors has established to promote such public benefit or public benefits and interests;

(2) The standards the board of directors has adopted to measure the corporation's progress in promoting such public benefit or public benefits and interests;

(3) Objective factual information based on those standards regarding the corporation's success in meeting the objectives for promoting such public benefit or public benefits and interests; and

(4) An assessment of the corporation's success in meeting the objectives and promoting such public benefit or public benefits and interests.

(c) The certificate of incorporation or bylaws of a public benefit corporation may require that the corporation:

(1) Provide the statement described in subsection (b) of this section more frequently than biennially;

(2) Make the statement described in subsection (b) of this section available to the public, and/or;

(3) Use a third-party standard in connection with and/or attain a periodic third-party certification addressing the corporation's promotion of the public benefit or public benefits identified in the certificate of incorporation and/or the best interests of those materially affected by the corporation's conduct.

#### Section 367: Derivative suits

Stockholders of a public benefit corporation owning individually or collectively, as of the date of instituting such derivative suit, at least 2% of the corporation's outstanding shares or, in the case of a corporation with shares listed on a national securities exchange, the lesser of such percentage or shares of at least \$2,000,000 in market value, may maintain a derivative lawsuit to enforce the requirements set forth in § 365(a) of this title.

#### Section 368: No effect on other corporations

This subchapter shall not affect a statute or rule of law that is applicable to a corporation that is not a public benefit corporation, except as provided in § 363 of this title.