

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

PRAISE VIDEO, INC., a	:	
Delaware corporation, Jacob	:	No. 43, 2014
Bissinger, Francis Pennock,	:	
Mark Van Zandt, Howard	:	Court Below:
Metcalf, Peter Hornberger,	:	Court of Chancery,
New Hope Publishing Co., and	:	C.A. No. 8974-CD
Praise New Hope Corp.,	:	
	:	
Defendants Below-	:	
Appellants,	:	
	:	
v.	:	
	:	
MERCER CHRISTIAN PUBLISHING	:	
CO. and Susan Beard,	:	
	:	
Plaintiffs Below-	:	
Appellees.	:	

APPELLEE'S ANSWERING BRIEF ON APPEAL

Team P
Counsel for Appellee

February 7, 2014

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NATURE OF PROCEEDINGS

This case involves the Court of Chancery's decision to enjoin the defendants from proceeding with an agreement to merge Praise Video, Inc., a Delaware corporation, ("Praise Video") with a wholly-owned subsidiary of New Hope Publishing Co., a Delaware corporation ("New Hope"). Plaintiffs Mercer Christian Publishing Co. ("Mercer") and Susan Beard commenced this suit on December 13, 2013, immediately after Praise Video's board of directors ("the board") rejected Mercer's bid of \$50 per share to purchase Praise Video in favor of New Hope's bid of \$41 per share that also included an unscrupulous "crown jewel" option.

Defendants argue that Praise Video's status as a Delaware "public benefit corporation," permits its board to accept New Hope's less profitable bid because Mercer might not continue to promote the public benefits outlined in Praise Video's charter. Defendants also argue that the board may influence a stockholder vote by accepting New Hope's "crown jewel" option if it promotes the public benefit identified in Praise Video's certificate of incorporation.

This appeal addresses whether the Court of Chancery erred in granting Plaintiffs' motion for a preliminary injunction.

SUMMARY OF ARGUMENT

1. The preliminary injunction should be upheld as the merger violates 8 Del. C. § 362(b)'s balancing requirement for any of three reasons. First, Praise Video's directors failed to consider the pecuniary interests of the shareholders and the material effects on Mercer and any other potential bidders. Second, the religious-oriented conduct of the corporation's business after the time that the corporation essentially ceases to exist post-merger and is not an appropriate concern for Praise Video's directors. Third, during the sale as a for-profit corporation, Praise Video has no corporate interest in promoting religious doctrine.

2. The preliminary injunction should be upheld when the decision of Praise Video's board to include the "crown jewel" option is reviewed under the *Blasius* standard. It will not be reviewed under either the business judgment rule or *Unocal* standard because the primary purpose of the "crown jewel" option was to deny shareholders the full ability to vote and it was not in a defensive action. Because the decision of the board is being reviewed under the *Blasius* standard, the board must demonstrate a compelling justification. For it has not. The board effectively ignored the pecuniary interests of the shareholders. By adding the "crown jewel" option the board prevented shareholders from opting out of the New Hope merger in

favor of the Mercer merger, which offered a higher bid price per share. Since the board of Praise Video has not demonstrated a compelling justification for the “crown jewel” option, which fails the *Blasius* standard, the preliminary injunction should be upheld.

STATEMENT OF FACTS

This case involves a dispute over the latitude given to corporations formed under Delaware’s new public benefit corporation laws.

I. The Initial Parties.

Mercer Christian Publishing Company (“Mercer”) is known for its best-selling Bibles, inspirational books, resources for church school curricula, and Christian faith-based multi-media content. (Mem. Op. at 6.) Although it maintains its own identity and is headquartered in Coral Gables Florida, Mercer is an indirect wholly-owned subsidiary of Mercer Media, Inc. (“Mercer Media”). *Id.* Mercer Media is a large media conglomerate headquartered in New York City and is traded on the New York Stock Exchange. *Id.* Mercer maintains an independent identity from Mercer Media, stating its mission is to “spread inspiration by developing and distributing content that promotes biblical values and honors Jesus Christ.” *Id.*

Praise Video, Inc. is a Delaware public benefit corporation created in September of 2013 by reorganizing Old Praise Video,

Inc. a closed Delaware corporation under Delaware's new public benefit statute.¹ Praise Video's reorganization into a public benefit corporation was made in anticipation of the sale of the company. *Id.* at 8. The board reasoned that reorganization altered the directors' legal obligations in selling the company giving it wider latitude in accepting less competitive bids. *Id.* Before becoming a public benefit corporation, Praise video was located in Lancaster, Pennsylvania. Its business dates back to the 1970's. *Id.* at 3. The founders of Old Praise Video belonged to the Mennonite Church USA and the majority of Old Praise Video stockholders were either Mennonites or related to members of the church. *Id.*

Jacob Bissinger has served as the CEO and a director of Old Praise Video since its creation. He owns around 22% of the common stock. *Id.* The other directors aggregately own around 4% of the additional outstanding shares. *Id.*

Plaintiff Susan Beard owns about 3% of Praise Video's outstanding shares. *Id.* at 5. She is one of the few stockholders who did not vote for the reorganization and is not a Mennonite. *Id.* She inherited her shares from her parents when they passed away in 2008. *Id.*

II. The Merger

¹ In the context of describing the company's business and history, references to "Praise Video" should be understood to refer to both Praise Video, Inc. and Old Praise Video, Inc. unless otherwise noted.

In early 2013, Jacob Bissinger, the CEO and a director of Praise Video, decided to retire. *Id.* at 6. In March of 2013, he began to explore ways to diversify his investments. Specifically, he wished to sell his 22% ownership of Praise video. *Id.* Praise Video's board of directors retained a financial adviser to explore possible transactions where stockholders would be able to liquidate their investment. *Id.*

By June of 2013, Mercer showed interest in acquiring Praise Video for "north of \$40" per share. *Id.* at 7. Bissinger, however, was concerned about what direction Mercer would take the company after a merger took place. *Id.* Specifically, about whether Mercer would expand into combat-oriented video games. *Id.* Bissinger and the rest of the directors, reorganized Praise Video into a public benefit corporation after Bissinger expressed concerns that he wouldn't have as much control as he wanted over who would buy the company. *Id.* at 8.

Bissinger wished to explore other options, but none presented themselves until defendant Pennock, another of Praise Video's directors, got involved with the merger plans. *Id.* at 6. He and the venture capital partnership Miller Price L.P. ("Miller Price"), formed New Hope as a Delaware corporation to buy Praise Video. *Id.* He owns approximately 20% of New Hope and intends to be CEO of the company after it acquires Praise Video. *Id.* Miller Price is a Delaware limited partnership, and owns 80%

of New Hope. *Id.* Isaac Miller, one of Miller Price's two principals, is Mennonite; His equal partner, Stephen Price, is not. *Id.*

At the December 9, 2013, Praise Video board meeting the board made several key decisions that are the basis of this dispute. *Id.* at 9. Praise Video had only received bids from Mercer and New Hope. *Id.* Mercer offered a fully funded \$50 per share deal. New Hope offered \$41 per share. Neither of the bidders would agree to have the company's post-merger certificate of incorporation include the public benefit provision in Praise Video's existing charter. *Id.* Other than the price, the only difference between the bids was that New Hope conditioned its offer on a restrictive "crown jewel" agreement it refers to as the "Gaming Option." *Id.* This option granted New Hope the option to acquire Praise Video's gaming division for somewhere between \$12-18 million if the New Hope merger failed to gain the necessary Praise Video stockholder approval. *Id.* The actual value of the gaming division is approximately \$30 million dollars, and equals about \$12 per outstanding Praise Video Share. *Id.* The gaming division contributes roughly 60% of the company's \$4 million per year profits.

According to the minutes of the December 9 board meeting, the directors evaluated the details of the two bids and voted to approve the New Hope bid (the votes were 4-1, with Pennock

abstaining). Bissinger, however, stated at the meeting that the possibility that Mercer would expand Praise Video's gaming operations into the combat simulation market space would, even with a generally Christian-themed orientation, be unacceptable in the light of church doctrine, and that he could not support a merger with Mercer regardless of the difference between the Mercer and New Hope bids. *Id.* at 9-10.

The Praise Video directors also recognized that the undervaluation in the Crown jewel option 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. *Id.* at 12.

ARGUMENTS

I. The preliminary injunction should be sustained because Plaintiffs have a reasonable probability of success on the merits of their underlying case.

A. Question Presented.

Whether Praise Video's directors violated their fiduciary duties by accepting a significantly less profitable merger deal that they felt better promoted the company's public benefit.

B. Scope of Review.

This Court is reviewing the grant of a preliminary injunction by the Court of Chancery based on the "reasonable likelihood of success on the merits." This Court's review is therefore de novo, as it gives "no deference to the embedded legal conclusions of the trial court." *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 394 (Del. 1996).

C. Merits of Argument

A preliminary injunction may be granted "upon a persuasive showing that it is urgently necessary, that it will result in comparatively less harm to the adverse party, and that, in the end, it is unlikely to be shown to have been issued improvidently." *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 579 (Del. Ch. 1998). A Plaintiff must demonstrate that: "(1) a reasonable likelihood of success on the merits, (2) imminent, irreparable harm will result if an injunction is not granted and (3) the damage to Plaintiff if the injunction does not issue

will exceed the damage to the defendants if the injunction does issue." *Id.* In this certified interlocutory appeal, Defendants have conceded that if Plaintiffs demonstrate a reasonable probability of success on the merits to this Court, a preliminary injunction is appropriate. (Mem. Op. at 13).

1. Praise Video's directors violated their fiduciary duty by completely failing to balance the corporation's public benefit with profit or other stockholder interest.

The public benefit corporation statute, 8 Del. C. § 361 *et. seq.* ("PBC Statute") does not give Praise Video's directors carte blanche to disregard the pecuniary interests of its stockholders or how their actions affect others. "If a corporation elects to become a public benefit corporation . . . it shall be subject in all respects to the provisions of this chapter, except to the extent this subchapter imposes additional or different requirements." 8 Del C. § 361.

In the Memorandum Opinion below, the Court of Chancery acknowledged that "[i]n our now traditional corporate law, the directors' actions would be considered unthinkable by any well-advised board of directors, because of their apparent inconsistency with the teachings of *Revlon* and its progeny." Mem. Op. at 2, *See also Revlon Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986). The defendants will argue that the PBC statute changes the fiduciary obligations of

the board of directors, and it does. But a board that ignores the established jurisprudence of *Revlon* and its progeny because it may now consider its public benefit in managing the corporation is misguided, and likely violates its fiduciary duties.

Delaware General Corporation Law Sections 362(a) and 365(a) create and impose on directors of public benefit corporations a tripartite balancing requirement. See also Franklin Balotti and Jesse A. Finkelstein, *Balotti and Finkelstein's Delaware Law of Corporations and Business Organizations*, § 368 (West 2014). Public benefit corporations must be "**managed** in a manner that balances [1] the stockholders' pecuniary interests, [2] the interests of those materially affected by the corporation's conduct, and [3] the public benefit identified in the corporation's certificate of incorporation." 8 Del.C. § 362, (emphasis added). Nowhere in the statute is there any indication that by altering the appropriate **management** considerations, the boards duties and considerations in selling the company change as well.

Praise Video's own CEO stated at the December 9th board meeting that considerations of a religious purpose effectively trumped any of the stockholders' pecuniary interests or the interests of those materially affected by the corporation's conduct. Praise Video's board failed the balancing requirement

of § 362 as well as their fiduciary duties by rejecting Mercer's bid, and accepted New Hope's, solely on the basis of continuation of its public benefit.

2. Praise Video's official "public benefit" ceases to exist in either merger deal and cannot be taken into account by Praise Video's directors.

In selling the company, a board of directors must consider the stockholders' pecuniary interest. Again, *Revlon* is apposite. Although a public benefit corporation may weigh the promotion of its public benefit, neither Mercer nor New Hope agreed to keep Praise Video a public benefit corporation after the merger. Therefore, any argument the Defendants may make regarding the continued promotion of the public benefit is speculation. New Hope would have absolutely no restriction on whether or not it promoted the Mennonite faith once it acquired control of the company.

Notably, § 363 requires two-thirds approval by the stockholders to merge into a non-public benefit corporation or a public benefit corporation without an identical public benefit in its charter. That type of transaction fundamentally changes the corporation because it no longer falls under the PBC statute.

A board may have "regard for various constituencies in discharging its responsibilities . . ." *Revlon*, 506 A.2d at 182. However, "such concern for non-stockholder interests is

inappropriate when an auction among active bidders is in progress, and the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder." *Id.* See also *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 999 n.32 (Del. Ch. 2005), ("Precisely how stockholder-focused directors must be is not entirely clear but the predominance of the stockholders' interest in receiving the highest, practically available bid in our Supreme Court's *Revlon* jurisprudence is undeniable." (citation omitted)); *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010), ("Promoting, protecting, or pursuing non-stockholder considerations must lead at some point to value for stockholders," holding that directors who failed to establish how their actions would lead to shareholder value "failed to prove ... that they acted in the good faith pursuit of a proper corporate purpose.").

Praise Video's directors, particularly Bissinger, could not have had the stockholders' interest in mind. They rejected a deal worth \$9 more per share, roughly \$9 million or 20% of the company's value, in order to sell the company to one of its current board members. That is over a quarter-million dollar difference for a 3% stockholder like Plaintiff Susan Beard.

3. Praise Video, as a for-profit corporation, has no corporate interest in promoting religious values.

"[A] for-profit, secular corporation cannot engage in the exercise of religion." *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 388 (3d Cir. 2013) cert. granted, 134 S. Ct. 678 (U.S. 2013). Although Praise Video is a public benefit corporation, it is still a for-profit corporation. As such, it has no corporate interest in promoting the incredibly strict Mennonite religious values.

Even though a large majority of the corporate shareholders are Mennonite, Praise Video has "decided to utilize the corporate form." *Id.* at 389. They cannot now "move freely between corporate and individual status to gain the advantages and avoid the disadvantages of the respective forms." *Id.* at 389. "The law has long recognized the distinction between the owners of a corporation and the corporation itself. A holding to the contrary—that a for-profit corporation can engage in religious exercise—would eviscerate the fundamental principle that a corporation is a legally distinct entity from its owners." *Id.*

II. A preliminary injunction blocking the merger of Praise Video and New Hope should be granted under the *Blasius* standard.

A. Question Presented.

Does Praise Video's board of director's decision to include the "crown jewel" option meet the compelling justification standard set forth in *Blasius*.

B. Scope of Review.

The *Blasius* standard implicates a question of law and therefore it is reviewed de novo. The court will look to errors in formulating or applying legal precepts. See *Stroud v. Grace*, 606 A.2d 75, 91 (Delaware 1992).

C. Merits of Argument

1. The primary purpose of the "crown jewel" option was to deprive shareholders full and fair opportunity to vote.

The first issue to be tackled is to determine the primary purpose of Praise Video's board's decision to include the "crown jewel" option. In order to determine the primary purposes of a board's actions, the court will look to the effects of corporate actions or confessions "[a]bsent confession of improper purpose the most important piece of evidence of what a board intended to do is often what effects its actions have." *Chesapeake Corp. v. Shore*, 771 A.2d 293, 320 (Del. Ch. 2007). So, to determine the primary purpose of the "crown jewel" option the board will look

to admissions concerning the "crown jewel" option and its effects.

The primary purpose of the "crown jewel" option was to deny shareholders the full and fair opportunity to vote. The ability to vote as a shareholder in a merger is a guarantee of General Delaware Corporate Law 251(c). Although not directly admitted, the board openly recognized in the minutes of the December 9 meeting that the option undervalued the gaming division and would encourage shareholders to vote for the New Hope bid even if they preferred a higher cash bid. New Hope acknowledged the option's purpose was to make their lower cash bid competitive with Mercer's higher cash bid. Both New Hope and Praise Video's boards recognized the option would make any other bids unsatisfactory and would force shareholders into accepting a \$9 less per share bid a \$41 per share bid.

The "crown jewel" option, if exercised, would gut the most profitable portion of Praise Video and sell it off at an extremely discounted price. No reasonable third party would pay top dollar for a company if an option existed that divested the company of its most profitable sector. Therefore, when looking at corporate admissions or the effects of their decision it can be determined the purpose of the "crown jewel" option was to deny shareholders the full and fair opportunity to vote.

2. Neither the business judgment rule nor the *Unocal* standard applies to the board's decision to include the "crown jewel" option.

The *Unocal* standard and the business judgment rule must be addressed. Under the business judgment rule the court would look to the board's action and determine whether the board's decision was a valid exercise of its business judgment. The business judgment rule is highly deferential to boards. In this scenario the decision by the board of Praise Video to include the "crown jewel" option had the primary effect of thwarting the full and fair opportunity to vote. It was an action designed to primarily interfere with a shareholder majority and therefore involves the court in the determination of the legal and equitable duties owed by an agent to the principal. It is not a decision to be made according to the agent's business judgment. See *Blasius Indus. Inc. v. Atlas Corp.*, 564 A.2d 651, 660 (Del. Ch. 1988). Therefore the court will look to the decision with a heightened level of scrutiny and will not apply the business judgment rule.

The *Unocal* standard applies when the board acts in a defensive capacity, "there was directorial power to oppose the . . . tender offer and to undertake the selective stock exchange made in good faith and upon a reasonable investigation pursuant to a clear duty to protect the corporate enterprise." *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d. 946, 958 (Del. 1985). Here the board of Praise Video was not fending off a takeover

but was trying to dictate the terms of a merger. The board was not engaging in a blocking maneuver. The "crown jewel" option was included to effectuate a merger.

Therefore the board's action is not reviewable under the business judgment rule or *Unocal* standard. The business judgment rule does not apply because it involves legal and equitable obligations owed by the agent to the principal. The *Unocal* standard is not appropriate because the board's action was not a defensive maneuver.

3. The board of Praise Video's decision to approve of the "crown jewel" option will be reviewed under the *Blasius* standard.

Under the *Blasius* standard shareholders cannot be denied a board of directors the ability to vote, a the penultimate right of a shareholder, "[If] a majority of the shareholders who were not dominated in any respect; could view the matter differently then did the board . . . they are entitled to employ the mechanism provided by the corporation law . . . to advance that view" *Blasius Indus Inc.*, 564 A.2d at 663. If the boards acted with the primary purpose of thwarting the stockholder vote then the board must demonstrate a compelling justification. See *Id* at 661.

The Delaware Supreme Court has admitted this is harsh standard to meet. "The burden of demonstrating a compelling

justification is quite onerous and therefore rarely applied.”
Williams v. Geier 671 A.2d 1368, 1376 (Del. 1996).

Additionally, in *In Re Mony Group, Inc. Shareholders Litig.*, 853 A.2d 661, 674 (Del. Ch. 2004), the court held “when the matter voted on does not touch on issues of directorial control, courts will apply the *Blasius* standard sparingly and only in circumstances in which self-interested or faithless fiduciaries act to deprive shareholders of a full and fair opportunity to participate in the matter and to thwart what appears to be a majority of shareholders.”

Though it is applied sparingly, the *Blasius* standard applies in this situation. Praise Video’s board’s actions did not touch upon directorial control but their primary purpose was to affect the shareholders full and fair opportunity to vote. Therefore they must demonstrate a compelling justification for such action.

The board of directors for Praise Video must demonstrate a compelling justification for denying shareholders the full and fair opportunity to vote with the “crown jewel” option. The most likely argument the board will make was that the compelling justification lies in the attempt to balance the pecuniary interests with the interests of their faith, and this was permissible because Praise Video was a public benefit corporation, “a public benefit corporation shall be managed in a

way that balances the stockholders' pecuniary interests, the best interest of those materially affected by the corporations conduct, and the public benefit or public benefits identified in the certificate of incorporation." 8 Del. C. §362(a).

When looking at the shareholders pecuniary interests the board will attempt to claim despite receiving a lower bid the shareholders would be receiving more per share than currently valued. The shareholders would still be making much more than if they sold their shares outright. Therefore since shareholders would be receiving a profit the pecuniary interests were balanced.

When looking at the faith based interest Praise Video will attempt to show it held a reasonable fear Mercer would venture into combat oriented video games. Mercer admitted in order to expand the video game division this would be the most likely path taken. Combat oriented video games would run directly contrary to the mission or public benefit of Praise Video, which is to produce media following the principles of the Mennonite faith. In the interest of avoiding such a situation the board approved of New Hope's "crown jewel" option. In exchange for the "crown jewel" option Praise Video received the guarantee by Pennock he would "operate Praise Video to the best of his ability in a manner consistent with the values of the Church." Therefore the compelling justification was the board ensuring

Praise Video would continue to operate in a manner in line with the Mennonite faith and the shareholders would be receiving a profit.

Praise Video has not demonstrated a compelling justification. In the balance of pecuniary and faith based interests the board placed to little emphasis on pecuniary interests. Instead the board was primarily concerned with their faith-based interests. The CEO Bissinger even stated he could not support a merger with Mercer regardless of its bid price. The board was primarily focused on the keeping the corporation in line with their faith. It did not consider whether an individual shareholder might prefer the highest cash bid. It is very possible an individual shareholder may have not given much weight to Pennock's promise to operate the company to the best of his ability. This hypothetical shareholder could have recognized the corporation formerly known as Praise Video was going to cease to exist and would have wanted the highest bid possible.

Further the board's interest in the public benefit produced by Praise Video ceases once Praise Video is merged. With the "crown jewel" option the board is attempting to unjustly influence the direction of a corporation in which they no longer have an interest. In fact in return for the "crown jewel" option all praise video received was a promise. Promises can be fickle.

There was no agreed upon disciplinary action written into the crown jewel option. Despite the Pennock's best abilities, if the gaming division ventured into combat oriented video games there would be no repercussions. There is not even record of the promise in a contract.

Additionally, neither Mercer nor New Hope proposed being a public benefit corporation post-merger. It is true Praise Video asked for the corporation to be public benefit corporations post-merger, but Praise Video's board still accepted the contrary Mercer and New Hope bids. If Praise Video was truly concerned with the direction of the company post-merger they could have only accepted bids proposing public benefit corporations.

It seems more possible Praise Video was more concerned with Mercer Media's ownership of Mercer. Praise Video's directors had a suspicion of a company wholly owned by a New York multimedia conglomerate. The board did not want to see their small public benefit corporation become moneymaking cog in a secular multimedia conglomerate. Therefore the board decided to sell Praise Video to someone with ties to the church, someone more local, a person they felt they could trust. A partner of Miller Price L.P. was a member of the Mennonite Church and Pennock served on Praise Video's board. These were the parties that formed New Hope. The board decided to sell to New Hope. They did

this through the "crown jewel" option. It effectively eliminated Mercer's bid from contention and deprived the shareholders of an essential right.

Praise Video has not demonstrated a compelling justification for thwarting shareholders' ability to vote. Instead there is evidence of Praise Video being primarily concerned with their religious based interests over the pecuniary interests, attempting to steer the direction of the company after giving up control and a possible anti-east coast bias. Since a compelling justification for purposely thwarting a shareholders full and fair opportunity to vote has not been established Praise Video's board has failed the *Blasius* standard. The preliminary injunction blocking the merger of Praise Video and New Hope should be upheld.

CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Chancery's grant of preliminary injunction enjoining any action to effectuate, enforce, or consummate any term or provision of the Merger Agreement between Praise Video, Inc., New Hope Publishing Co., and Praise New Hope Corp.