

IN THE SUPREME COURT OF THE STATE OF DELAWARE

Mercer Christian Publishing Co. and
Susan Beard,
 Plaintiffs Below,
 Appellees,
 v.
PRAISE VIDEO, INC., a Delaware
Corporation, JACOB BISSINGER, FRANCIS
PENNOCK, MARK VAN ZANDT, HOWARD
METCALF, PETER HORNBERGER, NEW HOPE
PUBLISHING CO., and PRAISE NEW HOPE
CORP.,
 Defendants Below,
 Appellants.

C.A. No. 8974-CD

ON APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND
FOR NEW CASTLE COUNTY

APPELLEE'S OPENING BRIEF

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Counsel for Plaintiffs Below,
Appellees

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NATURE OF PROCEEDINGS

On December 14, 2014 Plaintiffs Mercer Christian Publishing Co. ("Mercer") and dissenting minority shareholder Susan Beard filed for a preliminary injunction against the following Defendants: (1) Praise Video, Inc. ("Praise Video"); (2) Praise Video directors Jacob Bissinger, Francis Pennock, Mark Van Zandt, Howard Metcalf, and Peter Hornberger ("Defendant Directors"); (3) New Hope Publishing Co. ("New Hope"), and (4) Praise New Hope Corp. ("Praise New Hope").

The Court of Chancery issued a Memorandum Opinion on January 14, 2014 (hereafter cited to as "Op.") ruling as follows:

[T]he director's conduct, even in respect of a public benefit corporation like Praise Video, is inconsistent with their fiduciary obligations, and an order granting preliminary injunction against consummation of the Merger will be issued.

(Op. 3). The Delaware Court of Chancery issued a preliminary injunction order on January 15, 2014 enjoining Praise Video Defendants from taking any further action to effectuate the Merger Agreement between Praise Video and New Hope. ("Inj.")

Pursuant to Supreme Court Rule 42, Praise Video Defendants' filed an interlocutory appeal that was granted on January 23, 2014.

This is appellee's brief opposing this appeal.

SUMMARY OF ARGUMENT

I. Preliminary Injunction should be upheld because Appellees have a reasonable hope of success on the merits that directors breached their fiduciary duties according to DGCL § 362. The directors' decision to approve the New Hope merger over the high bid by Mercer was neither an informed nor a disinterested decision in light of the context in which it was made. The decision grossly failed to account for shareholder interests, and constitutes a breach of fiduciary duty under the Public Benefit Corporations statute.

II. The crown jewel lockup option unduly coerced shareholders to vote for the lower bid of the white knight, and was a draconian defensive measure that was not justified under the circumstances. The record reflects that defendant board's intent was to effect the shareholder vote to promote the accomplishment of the New Hope Merger. The board expressed deep misgivings about the potential impact of Mercer's status as a wholly owned subsidiary and subject to the ultimate control of Mercer Media, a secular, multinational media conglomerate. Defendant directors' concern about Praise Video's expansion into combat simulations is not a compelling justification because it is neither a hostile takeover by Mercer, nor a coercive action taken by powerful Praise Video shareholder against the minority shareholders. Furthermore, the crown jewel lockup option unduly coerced shareholders to vote for the lower bid because there are no other bids for shareholders to vote on after shareholder vote is effected to favor New Hope Merger.

STATEMENT OF FACTS

Praise Video was first organized as a Delaware corporation in the mid-1970s. (Op. 3). It specialized in producing and distributing filmed and digital entertainment, marketing its products as wholesome substitutes to the violent and sexual entertainment generally available on the market. (Op. 4). In 2003, Praise Video diversified its product lines to include Christian-themed video games. Id. Praise Video is strongly affiliated with the Mennonite Church. Id.

Jacob Bissinger, long-time CEO and director of Praise Video from its inception, owns 22% of the outstanding shares of Praise Video's common stock. (Op. 4). The other directors own in aggregate about 4% of Praise Video shares. Id. In early 2013, Bissinger decided to retire as CEO. (Op. 6). Bissinger announced to the board his intention to sell his shares in the company. Id. The board retained financial advisor Norman Stoltzfus to explore transactions by which Praise Video shareholders, including Bissinger, could liquidate their shares. Id.

Stoltzfus began bid shopping and located several bidders in June 2013. (Op. 7) One such bidder was Mercer Publishing Co. ("Mercer"). Id. Mercer is an indirect wholly-owned subsidiary of Mercer Media, Inc. ("Mercer Media"), a publicly-traded multinational media conglomerate. (Op. 5). Mercer maintains its own Christian corporate identify, distinct from its parent company. Id. Mercer's religiously affiliated mission statement is to "spread inspiration by developing and distributing content that promotes biblical values and honors Jesus Christ." Id. Mercer is known for best-selling Bibles,

inspirational books, resources for church school curricula, and audio and digital Christian faith-based content. Id.

From among the bidders Stoltzfus solicited, Mercer suggested it was willing to pay a price north of \$40 per share, and predicted that Praise Video's customer base would be dramatically expanded as a result of synergies with Mercer's own publications and gaming operations. (Op. 7). At a board meeting on June 24, 2013 Stoltzfus reported his findings to the board. Id. The directors praised Stoltzfus for finding bidders with Christian corporate identities, and were particularly pleased with Mercer as an initial impression. Id. However, Bissinger inquired into how Mercer planned to achieve synergies and enhance revenues, and Stoltzfus indicated that market growth was expected for combat-themed video games. Id.

This market prediction provoked considerable consternation. Id. Bissinger and Metcalf stressed their religiously held conviction that allowing for the possibility of violent video games was contrary to their religious obligation as expressed in their Articles of Faith.¹ Id. Of all the directors, only Holbrook mentioned that it was inappropriate for them as directors to attempt to maintain control of the post-merger entity. (Op. 8). Holbrook opined that it would be a function of the individual consciences of future actors to determine how to apply their assets to satisfy their religious obligations. Id. Holbrook stated that as stewards of the company they were obligated to

¹ Article 22 calls Mennonites to "witness against all forms of violence, including war among nations, hostility among races and classes, abuse of children and women, violence between men and women, abortion, and capital punishment."

achieve the highest sale price, but that it was not their right, either morally or legally, to speculatively strategize to account for the possible actions of the future stewards of the company. Id.

In reaction to this meeting, after consulting with corporate counsel, the directors reorganized as a Public Benefit Corporation under the newly enacted public benefit corporation statute to change their obligations for a sale of the company. Id. Their new charter's stated public benefit "the promotion of values articulated in the Confession of Faith in a Mennonite Perspective." (Op. 3). Shareholders were informed that this provision would function to provide directors with more flexibility to take into account Mennonite values in selling the company, in addition to allowing them to maximize the shareholder's financial wealth. (Op. 9). The Reorganization Merger was effective on September 30, 2013. Id.

Meanwhile, Praise Video director Francis Pennock initiated the creation of New Hope, of which he is approximately a 20% stockholder. (Op. 6). Pennock assembled a bid from New Hope and communicated it to Stoltzfus. (Op. 9). Pennock, bidder and director, also gave Stoltzfus further assurances that New Hope would operate Praise Video consistent with its current mode of operating, and would not expand into religiously questionable forms of digital entertainment. Id.

In mid-November, the board told all bidders to submit their best bids and merger documentation by December 15, 2013. Id. Mercer and New Hope submitted bids of \$50 and \$41 per share respectively. *Id.* Neither bid agreed to incorporate as a P.B.C. post-merger, despite Praise Video's request for this provision. Id. All else being equal, not only

was Mercer's bid 22% higher than New Hope's, New Hope's substantially lower bid price was also conditioned upon a crown jewel lockup option. (Op. 9-10). This bid condition gave New Hope the buy option to acquire Praise Video's gaming division for \$18 million if the stockholders voted against a merger with New Hope. (Op. 10). The Court of Chancery concluded that Praise Video's gaming division was valued at \$30 million, and the exercise price undervalued this division by about \$12 million, or 40%. Id.

On December 9, 2013 by a 4-1 vote (Holbrock dissenting, Pennock abstaining) the board approved the unmodified New Hope merger agreement containing the crown jewel lockup provision. (Op. 11). Bissinger and Metcalf reiterated their deep-laden concern about the possibility of Mercer expanding into games with combat simulations. Id. An uncontested piece of the record also notes:

Bissinger also stated at the December 9 board 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 light of Church doctrine, and that he could not support a merger with Mercer regardless of the difference between the Mercer and New Hope bid prices.

(Op. 11-12). Also on record is the Directors' consideration of the disenfranchising effect of the crown jewel lockup on the shareholders. (Op. 12) Specifically, the directors acknowledged that it would incentivize shareholders that may be predisposed towards Mercer's higher cash bid to nonetheless vote in favor of the merger with New Hope, despite their lower bid. Id. The shareholders have not yet voted to approve the New Hope merger pending the outcome of this litigation. Id.

ARGUMENT

I. PRELIMINARY INJUNCTION ORDER SHOULD BE UPHELD BECAUSE DIRECTORS BREACHED THEIR FIDUCIARY DUTIES UNDER TITLE 8, SECTION 365(A) OF THE DELAWARE CODE.

A. First Question Presented

Whether Defendant Directors breached their fiduciary duties under title 8, section 365 to balance the interests of shareholders, stakeholders, and the public benefit in an informed and disinterested manner.

B. Standard of Review

This Court reviews the grant or denial of a preliminary injunction by the trial court for abuse of discretion, but without deference to the embedded legal conclusions of the trial court. Kaiser Aluminum Corp. V. Matheson, 681 A.2d 392, 394 (Del. 1996). For a preliminary injunction to be granted, the moving party must prove: (1) a reasonable probability of success on the merits; (2) a reasonable probability of irreparable harm; and (3) that the harm of denying injunctive relief to the moving party outweighs the harm to the defendant if relief is granted. In re Unitrin, Inc., 651 A.2d 1361, 1371 (Del. 1995) (quoting Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1278-79 (Del. 1989); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 179 (Del. 1986)). Accordingly, the standard of review is de novo on whether appellees have a reasonable probability of success on the merits. Kaiser, 681 A.2d at 395.

C. Merits of Argument

i. Plaintiffs have statutory standing to bring a derivative suit under title 8, section 367 of the Delaware Code.

Appellees have standing for a derivative suit under section 367 of the Delaware Public Benefit Corporations Act. "Stockholders of a public benefit corporation owning . . . at least 2% of the corporation's outstanding shares . . . may maintain a derivative lawsuit to enforce the requirements set forth in §365(a) of this title." DEL. CODE ANN. tit. 8, § 367 (2013). Appellee Susan Beard owns 3% and Mercer 2% of shares outstanding, giving them the ability to bring derivative suit against directors to enforce section 365(a).

ii. Directors did not meet their title 8, section 365 fiduciary obligations to balance the interests of the shareholders, non-owner stakeholders, and stated public benefit in a disinterested and informed manner.

In a Public Benefit Corporation ("P.B.C.") the fiduciary duties of members of the board of directors are more expansive than in a regular corporation. § 365(a). Directors are required to take into account not only the shareholders interest in maximizing their wealth, but also balance into their considerations the interests of other stakeholders as well as the public benefit stated in a P.B.C.'s articles of incorporation. Id.

The board of ***directors shall*** manage or direct the business and affairs of the public benefit corporation in a manner that ***balances [1]*** the pecuniary interests of the ***stockholders, [2]*** the best interests of ***those materially affected by the corporation's conduct, and [3]*** the specific ***public benefits identified*** in its certificate of incorporation.

Id. (***emphasis ours***). The statute creates a presumption in favor of directors adequately conducting this tripartite balancing test, but the presumption only applies to decisions that are (i) informed, (ii)

disinterested, and (iii) not such that no person of ordinary, sound judgment would approve. § 365(b). Specifically, the statute provides that a director “will be deemed to satisfy such director’s fiduciary duties to stockholders and the corporation if such **director’s decision is both informed and disinterested** and not such than no person of ordinary, sound judgment would approve.” Id. (***emphasis ours***).

Inversely, if a director’s decision is either (i) uninformed, or (ii) interested, or (iii) such that no reasonable person would approve, then the directors *may* be deemed to have breached their expanded fiduciary duties under the tripartite balancing requirement. Id.

The informed and disinterested requirement of this chapter incorporates well-settled fiduciary principles of the corporate law of Delaware, namely that fiduciaries act with a duty of loyalty and a duty of care. E.g., *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985). The duty to make informed business decisions incorporates the duty of care; the duty to be disinterested incorporates the duty of loyalty. Typically, these two bedrocks of the fiduciary construct are examined for fissures before a court will superimpose its decision over a business decision. Id. at 872-73. Section 365(b) is thus essentially a codification of the general rule that “[j]udicial presumption accorded director and board action may only be invoked by directors who are found to be not only **‘disinterested’** directors, but directors who have both **adequately informed** themselves before voting on business transactions at hand and acted with requisite care.” *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 367 (Del. 1993). It cannot be construed as a shield licensing directors to act according to personal

motives. Rather, “[s]ince a director is vested with the responsibility for the management of the affairs of the corporation, he must execute that duty with the recognition that he acts on behalf of others.” Van Gorkom, 488 A.2d at 872.

Here the Defendant Directors neglected to consider the interests they were charged to act for and uphold. The evidence strongly suggests that their underlying motivation was not the best interests of the corporation, shareholders, or even the public benefit; rather, the evidence suggests that their course of action was motivated by strongly held personal beliefs as well as a self-serving interest to entrench their mode of operating the company. The directors also failed to inform themselves of all material information. Therefore, their actions constitute a breach of their duties of loyalty and care and expose their business decisions to judicial review.

To be informed, directors must deliberately seek out all information reasonably available to them prior to making a decision. Id. at 872; see also Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)). “In the specific context of a proposed merger . . . a director has a duty . . . to act in an informed and deliberate manner in determining whether to approve an agreement of merger before submitting the proposal to the stockholders.” Van Gorkom, 488 A.2d at 873.

Here, the directors did not act on a deliberately informed basis when they rejected the Mercer agreement because they did not seek out information reasonably available to them. The directors collectively failed to conduct further inquiry into whether Mercer intended to tap into the predicted video game growth market in a manner that would be

permissible. For example, they should have asked whether Mercer planned to make biblically-themed video games with an overarching military setting but without depictions of violence, i.e. the crumbling of the walls of Jericho or any of the manifold biblical stories involving military or spiritual combat. Without an informed or clear basis for doing so, the directors erroneously equivocated combat-themed games with the promotion of violence, and made grandiose assumptions regarding how Mercer intended to exploit this projected market. Rather than pursue an informed approach about the compatibility of Mercer's values with their own, the directors went off a hunch and treated Mercer as a hostile raider while they sought out a white knight. This disfavor of Mercer based on unclarified potential future actions was both presumptuous and uninformed.

The directors' approval of the New Hope merger agreement was seriously uninformed for another material reason: there was no agreement to include a public benefit provision in the post-merger articles of incorporation, despite a specific request for it. Under the pretext of acting to sustain their stated public benefit, they relied on illusory assurances by their fellow Mennonite board member and future CEO of New Hope, Pennock. This was certainly an uninformed decision because the promise of New Hope's enhanced ability to promote Mennonite values was not grounded. As a non-P.B.C., Pennock (also a minority shareholder) would have no post-merger control needed to carry out his promise. The director's decision, based upon a concern for effectively promoting Mennonite values, was thus uninformed.

The directors' decision to approve the merger with New Hope was not disinterested.

This Court has defined "disinterested directors" as those directors that "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."

Williams v. Geler, 671 A.2d 1368, n.19 (Del. 1996). In terms of the expanded fiduciary duties of the Public Benefit Corporations Act, the definition of financial disinterest can apply by analogy to other forms of personal benefit. In fact, this court has already couched disinterest in broader terms on previous occasions:

We have generally defined a director as being independent only when the director's decision is based entirely on the corporate merits of the transaction and is not influenced by personal or extraneous considerations. By contrast, a director who receives a substantial benefit from supporting a transaction cannot be objectively viewed as disinterested or independent.

Technicolor, 634 A.2d at 632 (emphasis added) (quotations omitted). In this broadened sense of the word, potential conflicts would include hunches, religious scrupulosity, and personal preferences.

Evidence of Bissinger's and Metcalf's clear personal considerations is strongly based in the record based upon their outspoken views on the supremacy of Mennonite doctrine as a trump to all other considerations. Even after the final decision, allegedly made pursuant to their balancing obligations, Bissinger restated his conflict of interest explicitly, and it exists on the record as follows:

Bissinger also stated at the December 9 board 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 light of Church doctrine, and that he could not support a merger

with Mercer regardless of the difference between the Mercer and New Hope bid prices.

Op. 11-12 (*emphasis added*). This statement contradicts the board's conclusory assertion that they balanced all three factors under section 365(a). This statement rather indicates that they gave no serious consideration into Mercer's strongly disfavored offer in any light, and particularly not in light of the shareholder's pecuniary interest. Given Mercer's strong alignment with Christian digital media and publications, there were synergies and customer expansion to be had beyond the gaming division. This would greatly affect the shareholders' short-term and long-term returns, and better facilitate distribution of materials in alignment with their faith. New Hope, on the other hand, was a shell company with nothing substantial to add to Praise Video's current operations. In addition to the strong alignment both in Christian values and in market position, Mercer's bid was substantially higher (22% higher), and their offer was not contingent upon a crown jewel lockup, which is a defensive measure particularly disfavored by this court. See generally, Macmillan, 559 A.2d at 1279, 1284 (explaining that lockups and similar auction-ending, bidder-skewing defensive measure must confer substantial benefit on shareholders and are subject to enhanced judicial scrutiny). The totality of the circumstances suggests that this decision was not made in an impartial, independent, or disinterested manner.

Bissinger and Metcalf exposed their religious concerns as a clear and absolute trump in their considerations. Consent can be inferred to the other defendant directors by their silence. Thus, collectively, the board failed to disinterestedly carry out their fiduciary duties.

With the exception of Holbrook, they exhibited loyalty not to the corporation's tripartite considerations, but loyalty to their own personal beliefs. Their approval of a lockup option is subject to exacting judicial scrutiny, and this court should rule that their auction was clandestinely and impermissibly skewed in favor of New Hope, the white knight created by a director as a favored option for the directors in a clear change-of-control scenario. Even in light of Delaware's new corporate entity, this sort of manipulation in a change-of-control sale should be firmly quashed on the basis of enduring principles of corporate law.

iii. The accountability structure for directors embodied in Delaware common law, particularly in change-of-control transactions, should not be disrupted.

As a matter of policy, section 362(b) is defined so broadly that the statute could be used defensively, as a means for self-interested directors to thwart Revlon or Unocal duties in anticipated or immanent change-of-control scenario. The Public Benefit Corporations Statute was enacted to encourage businesses seeking stronger corporate social responsibility to incorporate in Delaware. It should not be applied to allow conflicted managements to deep-seat their entrenchment strategy and discourage corporate transactions—transactions that spur economic activity, encourage investors to put their money in play, and provide opportunities for return on investment.

Revlon and progeny have walked the razor's edge between the competing values of authority and accountability. See Stephen M. Bainbridge, The Geography of Revlon-Land, 81 Forham L. Rev. 3277 (2013) (discussing policy, scope, and merits of Revlon and progeny). In

corporations where the ownership of the shareholders is distinct from the decision-making authority of the directors, this unavoidable tension is difficult to balance. Id. On the one hand, directors need authority to decide what is in the best interests of the company. On the other hand, shareholders need to be able to hold directors accountable when they act contrary to the best interests of the corporation. Too much accountability will discourage investing and innovation because disgruntled shareholders will prevent directors from effectively running a business. Too much authority will stifle capital formation because there would be no accountability to the owners. This court should beware interpreting Delaware's Public Benefit Corporations Act in a manner that is too disruptive of Delaware's common law because this would abrogate Delaware's prestige as the most legally predictable state in which to incorporate. In this case, that means refraining from interpreting title 8, section 365 in a way that would grant unprecedented authority onto directors at the expense of everyone else.

II. DEFENDANT DIRECTORS WERE UNABLE TO DEMONSTRATE A COMPELLING JUSTIFICATION FOR THEIR APPROVAL OF A MERGER AGREEMENT CONTAINING A CROWN JEWEL LOCKUP, DESIGNED TO DISENFRANCHISE UNCOERCED SHAREHOLDER INPUT.

A. Second Question Presented

Whether the crown jewel lockup option that Defendant Directors approved as a condition of the New Hope merger agreement constitutes a unjustified de facto shareholder disenfranchisement, designed to force shareholder approval for a transaction that they would otherwise think is neither in the best interests of the corporation or themselves.

B. Standard of Review

The same de novo standard of review provided supra at page 7 applies to the court's consideration of this second issue.

C. Merits of Argument

i. Enhanced judicial scrutiny is the proper standard of review.

There are three levels of judicial review, one of which is applied "[w]hen shareholders challenge directors' actions." Unitrin, 651 A.2d at 1371. The three levels of judicial review are the traditional business judgment rule, enhanced judicial scrutiny, and the entire fairness analysis. Id. The judicial review adopted is "frequently ... determinative of the outcome of [the] litigation" because "the effects of the proper invocation of business judgment rule is so powerful and the standard of entire fairness so exacting." Id.

The business judgment rule "applies to the conduct of directors in the context of a take over." Id. at 1372. The business judgment rule "is a presumption that in making a business decision defendant

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." Id. "An application of the traditional business judgment rule places the burden on the 'party challenging the [board's] decisions to establish facts rebutting the presumption.'" Id. The court will not substitute its judgment for the board "if the business judgment rule is not rebutted." Id.

Enhanced judicial scrutiny is a reasonableness inquiry in Delaware courts that applies to "actions which impair or impede stockholder voting rights." Paramount Commc'n v. Qvc Network, 637 A.2d 34, 45 (Del. 1994). This reasonableness inquiry includes two requirements. First, there must be "a judicial determination regarding the adequacy of the decision making process employed by the directors, including the information on which the directors based their decision." Id. Second, there must be "a judicial examination of the reasonableness of the directors' action in light of the circumstances then existing." Id. The burden of proof is on defendant directors to show that "they were adequately informed and acted reasonably." Id. However, "a court applying enhanced judicial scrutiny should be deciding whether the directors made a reasonable decision, not a perfect decision." Id.

The entire fairness standard of judicial review applies when the presumption of the business judgment rule is defeated in a shareholders' suit challenging a corporation's directors' actions. The entire fairness standard requires judicial scrutiny regarding both "fair dealing" and "fair price." Macmillan, 559 A.2d at 1280.

Here, enhanced judicial scrutiny is the proper standard of review because New Hope's conditioned bid with the crown jewel lockup conflicts with Praise Video's stockholders' statutory right to vote on the transaction. The crown jewel lockup in the New Hope and Praise Video merger would allow New Hope to acquire the gaming division of Praise Video for \$12 million or 40% below the actual \$30 million value, if the New Hope Merger failed to gain the necessary Praise Video stockholder approval. This crown jewel lockup was added because New Hope recognized that it would not be able to outbid Mercer, yet it wanted assurance that even a bid that was significantly, financially inferior would still have a strong chance of succeeding when put to shareholder vote. As a result, the crown jewel lockup limits the stockholders to vote for the deal with New Hope. This is because no deal with Mercer is possible if the crown jewel lockup is effective since Mercer would not buy Praise Video without its gaming division thereby, impairing stockholders' statutory right to vote. Furthermore, Holbrook's uncontested testimony adds evidence that stockholders' voting rights were impaired. According to Holbrook, Bissinger, the CEO and 22% stockholder of Praise Video, stated in the December 9 board meeting that he could not support a merger with Mercer regardless of the difference between the Mercer and New Hope bid prices. Bissinger's explicit statement impairs the stockholder vote because Bissinger never considered the Mercer bid to be a viable merger option for Praise Video. So, Mercer bid would never get presented to the stockholders to vote on. Therefore, the enhanced judicial scrutiny is the proper standard of review.

It can be argued that the board's decision to opt for the crown jewel lockup warrants a business judgment rule presumption. This line of reasoning relies on the good faith effort of the defendant directors, without anything materially lacking in the director's informational base that they acted under the genuine belief that the crown jewel lockup would promote the public benefit identified in Praise Video's certificate of incorporation. Following this reasoning, the burden would shift to the plaintiff shareholders to establish facts rebutting that presumption. However, this argument ignores that neither New Hope nor Mercer agreed that the company's post-merger certificate of incorporation would include the public benefit provision in Praise Video's existing charter, despite Praise Video's request for it. As a result, defendant directors cannot dictate how Praise Video should operate after the sale of the company. Therefore, any decision by defendant directors affecting Praise Video after the Merger does not get the business judgment rule presumption because it would be the job of New Hope directors to determine how best to manage New Hope. Thus, enhanced judicial scrutiny is the proper standard of review.

ii. Stockholders were deprived of their right to vote because defendant board intended to affect the stockholder vote through the crown jewel lockup to promote the accomplishment of the New Hope Merger.

Stockholders "can choose freely whether and how to vote, and may do so for any reason including 'for personal profit, or determined by whims or caprice.'" Kurz v. Holbrook, 989 A.2d 140, 179 (Del. Ch. 2010). To facilitate stockholder voting, the Board of Directors of a corporation are required to adopt a "resolution approving an agreement

of merger" and submit it "to the stockholders of each constituent corporation at an annual or special meeting for the purpose of acting on the agreement." DEL. CODE ANN. tit. 8 § 251(2014). The stockholders will consider the agreement and will either vote "for its adoption or rejection." § 251. Each stockholder is "entitled to 1 vote for each share of capital stock held by such stockholder" unless "the certificate of incorporation provides for more or less than 1 vote for any share, on any matter." DEL. CODE ANN. tit. 8 § 212(2014).

Furthermore, "Each stockholder is entitled to vote at a meeting of stockholders or to express consent or dissent to corporate action." Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 660. There are many policy reasons in support of stockholders retaining their right to vote. First, the stockholder vote is to protect the stockholders from "inadequate business performance" of the board members. Id. Second, the stockholder vote serves as a check on the exercise of power by the board members "over vast aggregations of property that" board members "do not own." Id. Third, the stockholder vote is exempt from the business judgment of the board members because effectiveness of a vote involves a conflict between the board members and a stockholder majority. Id. "Judicial review of such actions involves determination of the legal and equitable obligations of an agent towards his principal." Id. So, in terms of fairness, such decisions should not be left on the "agent's business judgment" as it may bias the stockholder. Id.

However, it is a well established principal that a board may take certain actions that are in the corporation's best interest or "that

have the effect of defeating a threatened change in control" as long as those actions are taken in "good faith." Id. at 659, 663. Yet, reasonable exercise of good faith when applied in the context of stockholder vote is not applicable unless there is a compelling justification. Id. at 659, 662. "The board bears the heavy burden of demonstrating a compelling justification for such action." Id. at 661. The application of this "compelling justification standard set forth in Blasius is appropriate only where the 'primary purpose' of the board action [is] to interfere with or impede exercise of the shareholder franchise, and the stockholders are not give a 'full and fair opportunity' to vote." Geier, 671 A.2d at 1376. As a result, the "burden of demonstrating a 'compelling justification' is quite onerous, and is therefore applied rarely." Id.

Delaware courts have recognized that there are circumstances that warrant a compelling justification to deprive the stockholders of their statutory right to vote on a merger so long as the board acts "independently, with due care, in good faith and in the honest belief that is actions were in the stockholders' best interest." Id. For instance, the board can thwart shareholder vote if the board faces a "coercive action taken by a powerful shareholder against" the minority shareholder. Id. at 663. The board can also thwart the stockholder vote "in the context of a hostile battle for control of a Delaware corporation where board action is taken to the exclusion of, or in limitation upon, a valid stockholder vote." Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985). This is referred to as a "Unocal" analysis and is "used only when a board unilaterally (i.e.,

without stockholder approval) adopts defensive measures in reaction to a perceived threat." Geier, 671 A.2d at 1377. In such situations, the board is granted the protection of the business judgment rule, and the burden shifts on the plaintiff to rebut the business judgment presumption. Unitrin, Inc. v. Am. Gen. Corp. (In re Unitrin, Inc.), 651 A.2d 1361, 1372 (Del. 1995). To overcome the business judgment presumption rule, the plaintiffs must demonstrate, "by a preponderance of the evidence that defendant directors decisions were primarily based on (1) perpetuating themselves in office or (2) some other breach of fiduciary duty such as fraud, overreaching, lack of good faith, or (3) being uninformed." Unocal Corp., 493 A.2d at 958. However, "[t]his Court has been and remains assiduous in its concern about defensive actions designed to thwart the essence of corporate democracy by disenfranchising shareholders." Unitrin, 651 A.2d at 1378.

Here, the record reflects that defendant board's intent was to effect the shareholder vote to promote the accomplishment of the New Hope Merger. The board expressed deep misgivings about the potential impact of Mercer's status as a wholly owned subsidiary and subject to the ultimate control of Mercer Media, a secular, multinational media conglomerate. The misgivings were evident by board members Bissinger and Metcalf, who were concerned about Mercer expanding Praise Video gaming division. Bissinger specifically found the expansion of the gaming division into combat simulations unacceptable in light of Church doctrine. Defendant board's concern about Praise Video's expansion into combat simulations is not a compelling justification

because it is neither a hostile takeover by Mercer, nor a coercive action taken by powerful Praise Video shareholder against the minority shareholders. Therefore, defendant board failed to meet the compelling justification standard set forth in Blasius and acted to thwart a shareholder vote without a compelling justification.

It can be argued that the compelling justification to deprive the stockholders of their statutory right to vote on a merger was to prevent a hostile takeover by Mercer of Praise Video. Following this line of reasoning, only two bids were made to acquire Praise Video. The inferior bid in price was from New Hope and the superior bid was from Mercer. The New Hope bid, although inferior in price to the Mercer bid, appropriately balanced the stockholders' pecuniary interests, the best interest of those materially affected by Praise Video's conduct, and the public benefit identified in its certificate of incorporation. Defendant directors recognized the undervaluation in price of the New Hope bid and decided it would likely encourage many Praise Video stockholders to vote in favor of the New Hope Merger, even if they individually would have preferred Mercer's higher cash bid. Therefore, defendant directors should be awarded the business judgment rule presumption because the record reflects that defendant directors acted with the utmost good faith, in the genuine belief that the New Hope bid would promote the public benefit identified in Praise Video's certificate of incorporation. As a result, defendant directors successfully demonstrated a compelling justification to deprive the stockholders of their statutory right to vote on the New Hope Merger.

However, this argument ignores, for the purposes of a preliminary injunction, that a good faith effort is not enough to deprive the stockholders of their statutory right to vote on a merger, and to determine for defendant directors whether the balance of pecuniary considerations and public benefit warrant a favorable vote on the transaction. As determined by The Court of Chancery, this is consistent with the holding in Blasius because the board's December 9, 2013 meetings decision on the New Hope Merger "constituted an offense to the relationship between corporate directors and shareholders that has traditionally been protected in courts of equity." Blasius, 654 A.2d at 652.

iii. The stockholder vote is wrongfully coerced because it would be used to solicit a favorable vote on the New Hope Merger on March 31, 2014.

The inquiry of whether a "stockholder vote has been robbed of its effectiveness by impermissible coercion depends on the facts of the case." Geier, 671 A.2d at 1382. Wrongful coercion can "exist where the board or some other party takes actions which have the effect of causing stockholders to vote in favor of the proposed transaction for some reason other than the merits of the transaction." Id. at 1381-82. Furthermore, this Court has held that the board "does not have unbridled discretion to defeat any perceived threat by any Draconian means available." Unocal Corp., 493 A.2d at 955. Measures that are coercive or preclusive by the board "are included within the common law definition of draconian." Unitrin, 651 A.2d at 1387.

Here, the record reflects that defendant directors took an action of affecting the stockholder vote to promote the accomplishment of the

New Hope Merger. Defendant directors favored New Hope, concluding that New Hope, after the New Hope Merger, would operate in a manner consistent with the values of the Church, as opposed to Mercer, despite Mercer bidding \$9 higher than New Hope per share. Furthermore, no merger with Mercer is possible so long as the crown jewel lockup is effective, where New Hope would acquire the gaming division of Praise Video for 40% below the actual \$30 million value, if the New Hope Merger failed to get the necessary stockholder approval of Praise Video. The combination of the crown jewel lockup and defendant directors affecting the stockholder vote to promote the New Hope Merger, along with the fact that there are no other bids, only left the New Hope Merger for stockholders to vote on. As a result, the stockholders are forced to vote on the New Hope Merger only. Since this measure of having only one option to vote is coercive in nature, it is also draconian because it is meant to solicit a favorable vote by defendant directors on the New Hope Merger.

CONCLUSION

Therefore, this Court should uphold the Preliminary Injunction Order by The Court of Chancery because plaintiffs have a reasonable probability of success on the merits on two alternative grounds. First, defendant directors breached their fiduciary duties under Section 365(a) of Title 8 of the Delaware Code. Second, defendant directors' approval of a crown jewel lockup as a condition to accept the New Hope bid unduly impeded and coerced a shareholder vote.