IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PONTIAC GENERAL EMPLOYEES RETIREMENT SYSTEM, on behalf of itself and all others similarly situated and on behalf of Nominal Defendant HEALTHWAYS, INC.,	:	
Plaintiff,	:	
v	:	Civil Action No. 9789-VCL
JOHN W. BALLANTINE, J. CRIS BISGARD, MARY JANE ENGLAND, BEN R. LEEDLE JR., C. WARREN NEEL, WILLIAM D. NOVELLI, ALISON TAUNTON-RIGBY, DONATO TRAMUTO, JOHN A. WICKENS, KEVIN WILLS, and SUNTRUST BANK,	:	
Defendants.	:	
and	:	
HEALTHWAYS, INC.,	:	
Nominal Defendant.	:	

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Chancery Courtroom No. 12C
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Friday, May 8, 2015
11:00 a.m.

- - -

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor.

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SETTLEMENT HEARING

APPEARANCES:

JOEL FRIEDLANDER, ESQ.
CHRISTOPHER M. FOULDS, ESQ.
BENJAMIN P. CHAPPLE, ESQ.
Friedlander & Gorris, P.A.
-and-
MARK LEBOVITCH, ESQ.
of the New York Bar
Bernstein, Litowitz, Berger & Grossmann LLP
for Plaintiff

WILLIAM M. LAFFERTY, ESQ.
D. McKINLEY MEASLEY, ESQ.
Morris, Nichols, Arsht & Tunnell LLP
-and-
W. BRANTLEY PHILLIPS, JR., ESQ.
JAMIE L. BROWN, ESQ.
of the Tennessee Bar
Bass Berry & Sims PLC
for Defendant Healthways, Inc. and the Individual Defendants

S. MICHAEL SIRKIN, ESQ.
Ross, Aronstam & Moritz LLP
-and-
GREGORY J. MURPHY, ESQ.
of the North Carolina Bar
Moore & Van Allen PLLC
for Defendant SunTrust Bank

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THE COURT: Welcome, everyone.

MR. FRIEDLANDER: Good morning, Your Honor.

THE COURT: Mr. Friedlander, how are you?

MR. FRIEDLANDER: Very good, thank you.

We are here, Your Honor, for the settlement hearing on, as we call, the Healthways case, but technically it's Pontiac General vs. Ballantine. So we have the typical three things to do about the fairness of the settlement, class certification, and the fee application.

In terms of the settlement, I think it's fair to characterize this as an important case that was litigated at an important time. As Your Honor may recall from the motion to dismiss, this company, on May 31 of 2012, there was a vote to destagger the board on a precatory basis, which was 10 for 1 in favor, and then eight days later, for the first time, the company decided to put into its credit agreement what we refer to as a dead hand proxy put with a 24-month look-back. And the 24-month look-back means that it could be triggered, debt acceleration

could be triggered if a board majority is replaced over a span of two annual meetings. So it's even potentially more entrenching than a staggered board.

We put in our demand letter for documents, pursuant to 220, in March of 2014 and, at the time, there was a pending proxy contest led by an 11 percent stockholder. That proxy contest, I suppose, was successful; three of the four nominees were put on the board. So there were 3 dissidents out of 11 on what was then a staggered board as of June 2014. We filed our breach of fiduciary duty complaint in June, on June 19th, and then we had the motion to dismiss briefing and argument in October.

As of year-end 2014, this was a company with about a $700 million marketing cap. It had $231 million of long-term debt that potentially could be accelerated if the proxy put was triggered. And the company had current assets of about $162 million.

In February, on February 11th, we filed the settlement agreement. The critical term of the settlement was that the company agreed to eliminate the dead hand proxy put. So it was publicly filed a good six weeks before the advance notice

deadline for this coming annual meeting. At the time, the board was in the midst of a strategic review, which they concluded on March 30 without doing a transaction. The dead hand put was removed by an amendment in April, April 21st. And next week will be an annual meeting -- on May 19th will be an annual meeting, actually, for the first destaggered board, because they destagger over time. So all the spots will be up. Although I don't believe there is any contest.

In terms of settlement terms, the key term was the elimination of the dead hand proxy put. Importantly, there is no payment of any fees to the lenders in exchange for eliminating it. And the company has also agreed that for any contracts of $20 million or above, that if there is any change-of-control provisions that impacts the ability to nominate or elect directors, that such provisions will be explained to the board for at least the next three years. And if there are any other contracts outstanding, they will be reviewed and brought to the board's attention.

On one hand, that might seem like nothing. On the other hand, you would think that

should be done in the ordinary course. Apparently, from this case and from -- certainly from the Amylin experience, this is not ordinary course. We would like it to become ordinary course for other companies; but here, that will happen, at least for the next three years.

Because it is a settlement, there is a release of the defendants relating to the 2012 loan agreement and the deliberations and disclosures relating thereto. And as we said in our brief, that the relief was actually more relief than we sought in the complaint, because the relief we sought was the invalidation of the put and we never sought damages. So, obviously, we are trading away a potential damages claim that someone else may want to bring theoretically, but it's hard to see that that would be a particularly valuable claim, and since we are getting more than we actually sought, it seemed like a more than fair trade.

The case had -- it was an important ruling on the motion to dismiss in a novel context. The challenge by our client was deemed to be ripe, the client was deemed to have standing in a situation when there was no proxy contest pending, and the Court

ruled that due to the deterrent effect on potential future contests, that this is a ripe claim. And the Court ruled that knowing participation had been adequately pled in light of the stockholder pressure at the time of the adoption, the fact that this was a change in the prior drafting of the credit agreement to include the dead hand aspect of the put for the first time, and in light of the prior decision by the Court in Amylin about the problematic nature of the proxy puts putting the board on notice.

That decision has gotten quite a bit of commentary about its import. Our friends on the lender counsel side of the universe, some of them seem to be up in arms about it. And there is commentary that continues to come out. There was an article, I guess by Kevin Miller, just a week or two ago. So he didn't pass out any buttons about anti -- no Healthways, but that's --

THE COURT: I'm sure he has those on the inside of his jacket.

(Laughter)

MR. FRIEDLANDER: He has articulated, and other people on the Internet are talking about, what the import of the ruling is, what this means for

the future. You know, will our dead hand proxy puts -- does this mean their demise? Does that mean they can continue to happen? And it still remains unclear how courts will rule on the merits of a future challenge, especially on a trial record. So the full defense of a dead hand proxy put has yet to be litigated, but it was litigated at least at the motion to dismiss stage here.

So we think it was an important case. We achieved what we wanted to accomplish. So that sort of concludes my presentation about the adequacy of the settlement.

In terms of class certification, I would struggle to think of anything unique about this case in terms of why it wouldn't satisfy (b)(1), (b)(2), or 23(a). So if Your Honor has nothing more to say, I will just proceed on with the fee application.

I guess maybe there are about three aspects I would like to say in regard to the fee application. The first is that it's -- I would like to focus on the negotiation, the fact it was a negotiated result, talk about the benefit, and then the other Sugarland factors.

As we said in our papers, this is a negotiated amount of $1.2 million. That deal got struck when it did because it was on the eve of a hearing in another case, and people who were fully informed about the risks and thinking about what it could be/should be determined this was the right number. And it was after we were far along in the drafting of the agreement and certainly well after the deal terms had been negotiated.

We cited a bunch of cases where arm's-length negotiations have been deferred to. I'm not suggesting that's a replacement for a Sugarland analysis, but I think it should carry weight.

In terms of the benefit, which is the most important factor, what this litigation did was restore the unfettered right to replace a board majority. The proxy put impinged on the election of even a minority of new directors at this coming annual meeting by virtue of the fact that there were three dissidents already placed on the board last year.

There are multiple doctrines of Delaware law or corporate law which depend on the fundamental importance of an uncoerced right to replace the board. So the context in which the

Delaware Supreme Court has talked about the importance of stockholders having the right to use the tools of corporate democracy to replace the board, it's been enunciated in Aronson; it's the rationale for the demand requirement; it's the rationale for why we let incumbent directors take defensive measures that are reasonable under Unocal. And it's also important to restrictions on the vote itself and analyzing the vote for terms of Blazius and its progeny.

So it's -- probably would be hard pressed to think of a more fundamental aspect of Delaware corporate law than the right to replace the board, and, for that reason, there's quite a bit of case law about that when voting rights are restored and preserved, that that's seen as a fundamental substantial benefit.

In terms of the other factors, I would point to the fact that this is a case of true contingent risk. It was the first case in this posture to be filed. We had to take the risk and undertake the effort of "Let's do the 220 demand. Let's get the documents, get past the motion to dismiss hearing," and then succeeded in prevailing in eliminating the proxy put. We were able to get to a

timely resolution to address any deterrent effects for the coming election.

And we were facing risks in that regard in terms of how would -- it was sort of unclear at any step of the way how the case would unfold in terms of what timing it would proceed, how had the directors, if at all, and the lenders taken Amylin into account when they put this provision in. Would we have an entitlement to get documents and would we get past a motion to dismiss were all open questions, especially given the fact that motions to dismiss were filed on two different grounds.

The other factor I would point to, in terms of counsel, we were able to bring to bear not just efficiency, but expertise in this area to seek an invalidation of what is, we shouldn't forget, a not-uncommon credit agreement provision. So these provisions are out there. Anybody who wanted to challenge them theoretically could say, "I'm going to challenge them," but nobody else had. And we drew on our experience in Amylin, and that's what gave us the confidence to go forward and to be able to go about it and do it the way we did, whether at the 220 stage or in opposing the motion to dismiss.

In terms of the implied hourly rate, we noted Your Honor's decision in ev3 that when complete victory is achieved on a relatively short time fuse, that the hourly rate -- the hours can be ignored. But even if we are not going to ignore the hours and just use it as a cross-check, the implied hourly rate here is $2,032. As of the day before the brief was due, there was 590 hours put in. As of the time of February 11th, when we submitted the settlement agreement, there was 506 hours. The implied rate there would be 2,371. That might be relatively high, compared to similar cases, but I would submit that the implied rate should be relatively high in this type of circumstance if the primary importance is placed on the benefit, if due regard for risk, efficiency, and total victory is recognized, especially in a case where the defendant said it was meritless right at the outset, whether at the 220 stage or at the motion to dismiss stage.

I would also like to say, in terms of incentives, this is an area of the law or a type of case in which it's important to get the incentives right, because this is a repeat -- this is an occurrence that can repeat. We know that lenders have

reasons for wanting to continue to market proxy puts. From the bank's perspective, they are getting a valuable right. And it's also a business opportunity, because they can offer this to borrowers who are conflicted. And not only conflicted, but in this era of stockholder activism, maybe have good reason to be concerned.

So in the absence of case law or, really, any ruling saying you can't do this, or these are the circumstances when you can or can't, until we have such a body of law -- and that law will only get created if contingent counsel -- contingently retained counsel filed suit -- there is no institutional check on the proliferation of proxy puts and dead hand proxy puts.

As I mentioned, no others have been challenged before now, except I will mention Amylin, which, importantly, was mooted. And if banks, if lenders think they can just moot lawsuits at the outset and do them on a relatively cheap basis, that will destroy the incentive for people to sue over them, while the incentive remains for the lenders and for the fiduciaries to keep putting the proxy puts in place.

And if you think of who else would do this, I mean, a lot of potential proxy contest contestants lack standing. You know, the people you might think, well, who has money in the game and skin in the game and would stop it would be the proxy contests. But these are the people who already are being deterred for various reasons from pursuing proxies. There is the usual concerns about cost and uncertainty and the deterrent effect of the put and, also, the added constraint that a lot of people -- activists would lack standing to attack something that happened two years before.

So, for all those reasons, we would think this is a case where the fees are appropriate. And to circle back, I think that's why the deal got struck when it got struck and why it got struck where it did.

THE COURT: So the thing that I struggle with here -- and I'm sure you've thought about -- in terms of the benefit, I wish I had some sort of economic proxy to give me some sense of what the value of it was so I wasn't just pulling a number out of the air. Everything you've said I agree with. But everything you've said could support reasonably --

and Mr. Lebovitch will be horrified that he didn't ask for more now, or you didn't ask for more now -- it could support 2 million; it could support 3 million; it could support 500,000. I mean, these are very persuasive arguments, but they don't track to anything that actually corresponds to money value.

And so I think that's one of the reasons why we tend to do two things in these circumstances. One is to use quantum meruit. But here, quantum meruit, I think, would underprice you, because you did achieve full success quite quickly.

The other thing that people look to historically is the arm's-length bargaining. But the problems with the arm's-length bargaining is it does have agency problems. And so it isn't as trustworthy as it might be. And I've been told by the Delaware Supreme Court -- I agree that there are Chancery Court opinions that say basically we defer to arm's-length bargaining. I agree there are ones that say that. But I always get, particularly on appeal, taken to task whenever I follow a Chancery opinion in lieu of the controlling Delaware Supreme Court opinions. So I have learned, through painful experience, that I better follow the Supreme Court opinions until the

Supreme Court changes the law.

So I've got to make some independent determination. What can I look to?

MR. FRIEDLANDER: Well, it makes me really glad that some of our friends over here appealed that EMAK fee award, so that comes from the Delaware Supreme Court.

THE COURT: Yes, exactly. I mean, that's a good example. Right?

MR. FRIEDLANDER: So, I mean, we are not writing on a blank slate. If I have any contribution to Delaware law to date, it's maybe been pricing these nonmonetary voting rights cases. So we do have precedents, and there are people -- there are judges who wrestled with the factors and looked at it and said, "What does quantum meruit mean?" And I guess there is a question, do you look at the size of the company or not, or where you can think of it as there is a range. But the range is always itself subject to adjustment, depending on the facts of the case.

So, as in many other situations, if you look at the precedent, I would think this type of case deservedly should be above what the hourly rates

that have been, say, in the Ceridians or the Yahoo!s. Obviously, those, in absolute terms, are larger. But in the effort to do cross-check and the things of that sort, we are not that far out of line and it's, I think, an irony in this area of the law that there are Court of Chancery cases awarding $4,000 an hour going back to the eighties, you know, and -- but somehow -- even when it's not exactly a common fund that's been created. So I don't think this is anything that's out of the range in terms of what we see in terms of lodestar multiples and things like that. So we are not on a blank slate. I think EMAK speaks eloquently to the importance of the benefit.

THE COURT: But if I did the reverse calculation -- and, again, I know many people don't like this way I think about it, either. But it's helpful to me. It's helpful to me in terms of framing these things. If I think about that you settled early, so I'm going to think about sort of a 10 to 15 percent range of benefit, what your number comes to is basically you conferred a 10 million to 15 million-ish benefit on the company.

Did you? I mean, I can come up with arguments why that would be true, and they would be --

because I haven't tried to do any sort of math on this. But they would be sort of the types of factors you've already identified: Corporate governance is good. Liberating the stockholders from the threat of the acceleration is good. It should have some upward pressure on the stock price that permits activists to come in and -- if you believe that they contribute to value, et cetera, et cetera. But where do I get a number?

And part of my problem is that it's one thing to come to something like disclosure cases, where we have more patterns and more trends. Here, I'm dealing with something relatively new. And so I'm trying to think, "Okay. What is this worth?" And, look, I'm not offended at all by your number. But I personally like there to be more of a rationale to my figures that I come up with than just, like, "Yeah, it seems all right. Friedlander is a good lawyer. He deserves to get paid. He did a good job in this case, and this is what he asked for and the defendants agreed to." For my own personal feeling that I have actually made a defensible decision, I like to have something more to tie it to. So how do I get there on something like this? How does it make sense to me

that you created a $10 to $15 million benefit?

MR. FRIEDLANDER: Well, for better, for worse, I think EMAK forecloses that straight monetary equivalent. I mean, because then we were talking about a company -- you know, we didn't have valuation experts, but you can argue -- in a range of 10 to $50 million, even though the growth potential was there. And the Supreme Court was very clear that you can't just look at the monetary equivalent because of the importance of voting rights and because you would be creating all sorts of perverse incentives for smaller cap companies to say, "Okay. Here, you want to go litigate against me, but don't expect to be compensated well for it."

So the Supreme Court didn't say there was a corollary on the upper end. But when we start thinking about Yahoo!, at the time, that was a $13 billion company. Carl Icahn is out there without standing, and this allows him to finish his proxy contest. That should be worth a heck of a lot of money. But that's not a rationale that the Chancellor applied in that case.

So I think you can't have the direct correlation, but you are left with the soft Sugarland

factors, which I guess they are somehow meant to apply to everything.

THE COURT: Part of what I -- again, for me -- what I like to do is to at least use a rough economic proxy to get into a neighborhood. So that at least gives me a sense of what the order of magnitude should be.

And I agree with you, you know, using that, if you base it on market cap, or something like that, it can certainly drastically undercompensate in some situations and certainly drastically overcompensate in other situations. So it's not, by any means, a purely mathematical thing. But I do think it provides some, at least, sense to make sure that you're not wildly out of whack.

I mean, I remember when, again, there were -- people would come in and reduce a termination fee and claim the benefit was the whole amount of the fee, even though there was only a minimal chance that it was actually going to be triggered. And so I think trying to think of what's the real-world economic impact of these things helps you avoid falling into that trap of buying off on that type of argument.

MR. FRIEDLANDER: Okay. Well, for

this size company, if you think about it, let's say this was the meaningful motion practice and -- I mean, not discovery; but there was 220, so there's informal discovery or statutory discovery. So if we are in the 15 percent land, then -- everybody help me with my math -- but this would be about -- so then the benefit would be something less than $15 million, I believe. Right?

THE COURT: Yep.

MR. FRIEDLANDER: So $15 million on a $700 million company, when you are talking about is this a company that now has -- where someone was impeded. And, also, it's a pretty large put. So the put is pretty large. I think you can say it's a pretty fair deterrent effect, given the acceleration. And whatever people were hoping to get out of that, or feared might come out of that, that I think we are preserving a measure of accountability, whether or not there's a contest. And if there's a contest, it's enhancing the likelihood of a contest.

So that's now more where you have a board that's now going out and doing the strategic review, even though it didn't end up in a deal, where there was a responsiveness to stockholders, if you

compare this from pre-June 2012 to January or February 2015, where you're talking about a responsiveness to stockholders and a willingness to explore change-of-control transactions for fear that if they don't, they won't get reelected. And if you use a baseline of $700 million, I don't think that's -- I think that's a fair margin, if you think you are going to apply percentages.

So I haven't done the back of the envelope, but even if you take away the small cap or even the nano cap size of EMAK, which was $1,500 an hour and was upheld by Delaware Supreme Court, and put aside the Yahoo! $13 billion and think, you know, what's the market-moving effect of -- you know, percentage of the market cap there. And I think it would be fair on this size company.

THE COURT: Thank you.

MR. FRIEDLANDER: It its current situation, too.

THE COURT: Thank you.

MR. FRIEDLANDER: Thank you.

THE COURT: Anything from any of the defendants?

MR. LAFFERTY: Your Honor, I represent

Healthways and the directors, and Mr. Phillips and Ms. Brown at counsel table from Bass Berry and Mr. Measley.

THE COURT: Welcome.

MR. LAFFERTY: I will just say -- and I am happy to answer any questions Your Honor has about either our thinking on the negotiations or otherwise. I don't want to give away any trade secrets, but I would be happy to explain how we went at it, if you want to hear it.

THE COURT: Look, it's always helpful to hear how experienced people think of these things.

MR. LAFFERTY: I can say this. I mean, obviously, we -- you know, we took Your Honor's ruling on the motion to dismiss, I think, at heart and we negotiated at arm's length, you know, in a real back and forth with the plaintiff's counsel. Mr. Wales, who is not here today, and I were the principal negotiators, at least that had the direct contact. And I think Mr. Lebovitch and I probably more so on the fee, which did not come until -- and I think Your Honor doesn't doubt that, that we didn't talk about the fees until after we had a deal on the substance.

We tended to look at this -- and I think what Sugarland dictates is a more holistic look. I do think that you have to -- I find this one very difficult to give you the economic anchor that I know Your Honor likes to get in some of these cases. It's not easy to do. What we did was we looked at the precedents. And we really dug into the facts. We compared them to our facts and the status of the case, how far it had been litigated. And we came to -- and they wanted more. We wanted a lot less. And we really had a back and forth over, I don't know, a week or two, more, after we had a deal on the settlement, and we came to the number that we came to.

You can look at precedents like Amylin and Sandridge and see what those fees are. Those cases tended to be more heavily litigated, both in terms of the discovery front, injunction briefing, active proxy contests going on.

This case was not quite like some of the other cases, where there had been a filing of a complaint in a circumstance where the proxy put had no chance of really being enacted or becoming active or real. This case, we did make them go to a motion to dismiss hearing. We did have back and forth on books

and records. And our take was it fell in the middle, somewhere between the low end of the case and the higher spectrum of Sandridge and Amylin. And that's how we -- I'd say that's how we thought about it and that's how we came at it. We think that's consistent with Supreme Court precedents.

THE COURT: Look, I think it is helpful, and there is no doubt it's a holistic analysis; it's not a mathematical analysis. I guess, to the extent people criticize an attempt to bring some sort of economic hook to these things as being unsubstantiated or speculative, or things like that, I think the push-back to the precedential method, which is, I think, equally viable -- I have no criticism of it. I think it's a great way to think about it. I think you have approached it very well. But when you dig down into some of these things and you try to see what the earlier precedents were based on, they seem to have been based on not very much, or just based on sort of a lot of holistic sort of feels right and Mr. Friedlander and Mr. Lebovitch are good lawyers and we like them and they ought to be well compensated. And so if you are building on prior precedents that themselves aren't built on much, then I think that the

precedential method is, to some degree, subject to the same type of criticisms in terms of being speculative or maldirective as a more economic method. And I think part of -- that's something we saw in these disclosure cases.

MR. LAFFERTY: I agree with you.

THE COURT: Because what happened was people were just collecting precedents, and you sort of had the "My case is slightly better," so you had an upward ratchet, and it just rose, rose, rose, rose, rose until at some point you have got to say, "Look, can we actually tie this to some type of meaningful thing that gives us a sense of why you ought to be getting it?"

In this case, the fee doesn't offend me at all. I am fine with the fee, and I would approve it. But I do feel like it is a somewhat -- I don't want to say arbitrary, because it's certainly well grounded when you look at precedents like ev3 or EMAK or things like that. It's well grounded in that sense.

I don't feel like I have an economic neighborhood sense that I'm starting from, and that makes me a little uncomfortable.

MR. LAFFERTY: Look, I do understand that, and I do respect the notion of wanting to get that economic grounding. And if we could make this formulaic, it would cut off the negotiations and they would be a lot quicker and we wouldn't have nearly as much back and forth. We would run the calculation and that would be the end of it and we wouldn't have this back and forth.

But I do think that this is a circumstance where we took a lot of factors into consideration in sort of getting where we got, including the fact that, you know -- and my firm was involved in the Arris case. So we knew about that. It wasn't like we didn't have that as a data point. We knew exactly what was going on in that case, and we took that into consideration as well. So thank you.

THE COURT: Great.

Anything else from anybody else?

MR. FRIEDLANDER: I hesitate to say it, but I messed up the math. So 15 percent back on 1.2 would be $8 million, not 15.

THE COURT: No, no; I hear you. As I say, we are in that, whether it's 10 to 15, 8 to 15, somewhere in that sort of magnitude. It's not an

exact science; it's just getting intellectually to the neighborhood so that I can think, "Okay. What is the implied benefit that they are claiming here, and does that really make sense to me?" You know, sometimes it doesn't. Here, it does. At least intuitively.

So today's hearing is so that I can consider the proposed settlement in Pontiac General Employees Retirement System vs. Ballantine. The litigation concerns the adoption of a dead hand proxy put. I know many object to that term, because they want to make sure everyone understands it is only an acceleration of the debt that happens to be triggered by specific circumstances. But economically that's a put, and because the put is on debt that involves money, there is no difference between an acceleration right conceptually and a put. So I personally am not terribly offended by this term. If somebody wants to come up with something more anodyne, just as we use "rights plan" for poison pill, I will be happy to use the more neutral and anodyne term. But until then, "dead hand proxy put" is easier to say than "acceleration right triggered by a new board majority with a 24-month look-back period." All right. Sorry for that digression.

The dead hand proxy put was put in place by the board of directors of Healthways, and it was contained in the fifth amended and restated revolving credit and term loan agreement with defendant SunTrust Bank as administrative agent. Under this provision, the election of a majority of the board by dissidents within 24 months would trigger acceleration of the company's debt under the credit agreement. Under the terms of the proposed settlement, the proxy put is eliminated from the credit agreement. In addition, any future material contracts containing change-of-control provisions would be brought to the board's attention and all current material contracts will be reviewed for these types of provisions.

First, in terms of class certification, the parties have agreed to a definition of a class identical to the one provisionally certified in the scheduling order entered on February 20, 2015. The class encompasses all persons who held Healthways common stock at any time during the period from June 8th, 2012, through and including the close of trading on February 10, 2015, excluding the defendants and their affiliates, as well as

SunTrust and the other lenders. This class definition is reasonable and an adequately cohesive unit for litigation, so I will adopt it.

The Rule 23(a) requirements are met. As to numerosity, there are approximately 35.6 million shares of Healthways common stock outstanding as of March 6, 2015, making it reasonable to assume that Healthways shares are held by owners across all of the United States. Perhaps broader. The numerosity requirement is, therefore, met.

In terms of commonality, the plaintiff alleged common injuries arising from the alleged breaches of fiduciary duty by the board and the purported aiding and abetting by SunTrust.

Typicality is also satisfied because all class members as stockholders faced the same injury from the same conduct and the plaintiff was affected the same way as the rest of the class.

In terms of the adequacy of class representation, there is the necessary affidavit of Charlie Harrison, III on behalf of Pontiac General Employees Retirement System stating that he held Healthways stock during the relevant period. There is no evidence of any divergence between the interests of

the plaintiff and the class. The plaintiff retained counsel that is well known to the Court, has a record of success in this Court and, given their prior experience in litigation of this type involving similar provisions, is eminently qualified to litigate this matter. The class representative supports the settlement. In my view, adequacy of representation is met.

The class is properly certified under Rule 23(b)(1) because prosecution of separate actions by individual class members would risk inconsistent and varying results and because adjudication with respect to one class member would be dispositive to the class's interests.

The class is also appropriately certified pursuant to Rule 23(b)(2) because the defendants acted in a manner generally applicable to the class, making classwide declaratory or injunctive relief appropriate. Here, the most likely remedy would have been some form of declaration or injunctive relief addressing the put. So it's similarly suitable for certification as a non-opt-out class under 23(b)(2).

In addition to the Rule 23(e)

affidavit that was filed, the class representative also filed the requisite 23(aa) affidavit. All of the requirements for class certification are satisfied and I am certifying this action.

Pursuant to Rule 23(e) of the Rules of Chancery, "... notice by mail, publication or otherwise of the proposed dismissal or compromise [of a class action] shall be given ... in such manner as the Court directs ...." A notice of settlement is sufficient if it contains a description of the lawsuit, the consideration for the settlement, the location and time of the settlement hearing, and informs class members that additional information can be obtained by contacting class counsel.

I preliminarily approved the form of notice in paragraph 7 of the scheduling order entered on February 20, 2015. The notice described the lawsuit on pages 3 through 5, the consideration for the settlement on pages 6 through 7, the location and time of this hearing on pages 13 through 14, and provided contact information for class counsel.

The affidavit of Joseph C. Fraga, a senior director of operations at Garden City Group, the authorized agent to effect mailing, demonstrates

that the notice was sent, as directed by the Court, on March 3rd. Garden City received a list from the transfer agent containing information for registered holders during the class period. This list contained 271 record holders. Garden City mailed to those record holders, as well as to its own proprietary list of 1,967 securities brokers, dealers, banks, and other nominees. Garden City also caused the notice to be published in the Investor's Business Daily and to be transmitted over PR Newswire. In response to its mailing to record holders and nominees, Garden City obtained 20,125 additional names and addresses and sent them copies of the notice. So, in my view, notice was adequate.

Now let's talk about the merits of the settlement. The Court's job is to determine whether the terms of the proposed settlement fall within a range of reasonableness, recognizing that this Court generally favors settlement but, at the same time, also recognizing that this Court has to act in a fiduciary capacity when approving a representative action settlement.

In this case, plaintiff asserted the following claims: The plaintiff claimed that the

board members breached their fiduciary duties by failing to extract improved economic terms in return for the proxy put. Plaintiff claimed that by agreeing to the proxy put, the board sought to entrench itself and impair the franchise rights of Healthways stockholders. The plaintiffs sought declaratory relief to those effects, as well as an injunction to preclude enforcement of the provision. Plaintiff claimed that SunTrust aided and abetted the board's breach of fiduciary duty by agreeing to insert the proxy put in the credit agreement. The plaintiff alleged that SunTrust knew or had reason to know that agreement to the provision was a breach of the board's fiduciary duties and sought declaratory relief on those issues.

I previously denied a motion to dismiss in this action, so the claims certainly -- in my view, at least -- were meritorious when filed. I think that that was probably one of the more frequently misrepresented or misunderstood rulings of mine. People seemed to react to the motion to dismiss as if it was a finding of liability or a determination of liability, almost a grant of final relief on the claims. It was not. It was a determination, under

the reasonably conceivable standard that applies in this situation, that given the facts surrounding the timing of the adoption of the proxy put, as well as the knowledge of these provisions that was outstanding at the time, that it was reasonably conceivable that the plaintiffs could prevail on their claims. Such a finding certainly holds out the possibility that on the merits it may be proven otherwise and that the pleadings-stage determination could be wrong.

One of the other factors that was misunderstood about that decision was it was generally viewed as if it applied to any change-in-control provision in any loan agreement, which, frankly, is specious. It addressed a dead hand proxy put, adopted in the shadow of a proxy contest. It didn't address things like other acceleration rights that might be triggered by breaches of debt covenants or similar lender-protective provisions that do not affect the stockholder franchise.

Finally, as I noted, the facts in the complaint suggested that this provision was inserted in the shadow of a control contest. And that can't be stressed enough. People, again, have acted as if this was a finding of liability on an aiding and abetting

claim against any lender who at any point for any company or for any issuer put one of these things in place. The nice "S" word to use for that is "silly." It was a contextual ruling based on the facts of this case applying the reasonably conceivable standard.

Now, the reason I talk about that for purposes of settlement is because what it means is there were obstacles to the claims. The plaintiffs might well not prevail on their claims. They had claims that were meritorious when filed, but they were claims that could be contested. Any claim for monetary damages would have been subject to Section 102(b)(7) and 141(e) defenses. Particularly in terms of SunTrust's liability, there would have been factual disputes regarding the degree to which SunTrust knowingly participated in the underlying misconduct, assuming there was misconduct. It's one thing to draw a permissible inference at the pleadings stage. It's quite another thing to view a matter in the context of actual discovery into what the negotiations and discussions were.

Viewed properly in that context, as opposed to with an alarmist view that liability, in fact, was established, the settlement consideration, I

think, is quite significant and ample. The plaintiffs received what they could have achieved at trial realistically. They obtained the elimination of the proxy put from the credit agreement. SunTrust did not receive a fee for eliminating this provision, which is something that a lender might otherwise have asked for. And I'm not saying otherwise should ask for, but I'm saying it's something that lenders otherwise frequently ask for. The plaintiffs also obtained the institution of internal controls that will remain in place for three years to prevent the unconsidered adoption of change-in-control provisions in material agreements, defined as contracts in excess of $20 million, as well as a review of all current material contracts for change-of-control provisions.

It may well be that there's a lot of boards that know about whether there are change-of-control provisions in the company's material contracts. It may well be the exceptions that this Court frequently sees in cases where boards don't seem to know about potentially entrenching provisions like dead hand proxy puts or don't ask/don't waive standstills, or other things that are material provisions that have a big effect on either proxy

contests or change-of-control issues. But the fact that we keep seeing cases in which that is the case suggests to me that this is additional and important relief, and it's not relief the plaintiff could have achieved at trial given the limitations of this action.

Consequently, in my view, the consideration obtained exceeds what the plaintiffs likely could have obtained at trial and is certainly within a range of reasonableness for the release that the plaintiffs are giving on behalf of the class.

This brings me to the plaintiff's motion for award of attorneys' fees. Delaware's policy is to ensure that even without a favorable adjudication, counsel would be compensated for the beneficial results they produced, provided that the action was meritorious when filed and had a causal connection to conferred benefit. Our goal is to appropriately incentivize counsel to pursue meritorious claims, but without conferring socially unwholesome windfalls. In evaluating the fee amount, this Court applies the factors set forth in the Sugarland decision and recently reformulated by the Delaware Supreme Court in the Americas Mining

decision. Particularly under Americas Mining, it's clear that the size of the benefit is the most important factor.

In my view, this was a significant benefit. As you could tell, I'm sure, from my discussions with Mr. Friedlander and Mr. Lafferty, I do feel somewhat unmoored from any economic proxy that would get me into the right neighborhood to make sure that I am not giving an award that is dramatically off the mark. But when I think about the right neighborhoods, the right neighborhoods are probably north of where this fee comes out in terms of the benefit. I think that, if anything, this fee is at the low end and, hence, I am not at all troubled by the lack of a good economic proxy.

In terms of the other Sugarland factors -- and I should say, before I turn to the other Sugarland factors, if I think about it in terms of the precedents, I also think it's well supported and is, if anything, at the slightly moderate end. I wouldn't say it's at the low end of the precedents, but it's at the moderate end. So I think counsel involved deserve an accommodation for coming to a reasonable and appropriate award. I think it's much

better when people do come to that type of award rather than trying to overask, and then you get extreme positions on both sides.

In terms of deferring to the negotiated award, I think that because this is within the type of range that I think is pretty acceptable, it's something where I do take into account the negotiations and am happy to defer to and not quibble with the number.

In terms of the other factors, in terms of time and effort of counsel, I think that because of the achievement of pretty much everything that could have been achieved in the litigation, plus a little bit more, I'm not worried about the time and effort. A cross-check isn't exorbitant. And, as I say, I think it's truly secondary, if not tertiary, in this case.

The complexity of the litigation actually favors the award that was requested. This case was more complex, certainly, than a cookie-cutter, disclosure-only settlement. It involved some new and novel issues. Plaintiff's counsel, as to that factor, has an established track record of generating meaningful results. This isn't a

situation where I would be paying somebody who normally bills at $100 an hour an implied rate of $2,000 per hour. In this case, the plaintiff's counsel brought a particular expertise to bear.

Lastly, there is real contingency risk in this case because this was a novel issue. There was support in Amylin and Sandridge, and, indeed, the understanding of the law that I think existed after Amylin and Sandridge was something I took into account at the motion to dismiss stage. But in terms of challenging a proxy put at the time when the matter was in shadow, rather than in the actual context of a live contest, it was a novel issue that had carried contingency risk.

I have thought about the comparison of this case with the Arris settlement. I think that the factors that I've already discussed go a long way to distinguish this case from Arris. In Arris, the defendants mooted the action by eliminating the proxy put. Here, the plaintiff settled and secured additional benefits in the form of internal governance controls beyond what was achieved in Arris. I do think this provision was particularly potent and that it was adopted in a context that gave rise to, at

least at the motion to dismiss stage, reasonably conceivable inferences about the problematic conduct.

So for all these reasons, I'm going to approve the requested fee of $1.2 million.

Mr. Friedlander, do you happen to have an order that I can conveniently sign?

MR. FRIEDLANDER: I do. And a digital version attached to it.

THE COURT: All right. So I am handing this to the Court clerk. It will be entered on the docket.

Thank you, everyone, for coming in today. I appreciate your presentations. I have also appreciated how you've handled this case. It's nice to have one that I don't really have to worry about. So thank you very much.

(Court adjourned at 11:56 a.m.)

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CERTIFICATE

I, DEBRA A. DONNELLY, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Merit Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through 42 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings at pages 28 through 42, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 11th day of May 2015.

/s/ Debra A. Donnelly

Debra A. Donnelly
Official Court Reporter
Registered Merit Reporter
Certified Realtime Reporter
Delaware Notary Public