

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

 CHANCERY COURT REPORTERS
 New Castle County Courthouse
 500 North King Street - Suite 11400
 Wilmington, Delaware 19801
 (302) 255-0522

1 APPEARANCES:

2 JOEL FRIEDLANDER, ESQ.
3 CHRISTOPHER M. FOULDS, ESQ.
4 BENJAMIN P. CHAPPLE, ESQ.
Friedlander & Gorris, P.A.

5 -and-

6 MARK LEBOVITCH, ESQ.
7 of the New York Bar
8 Bernstein, Litowitz, Berger & Grossmann LLP
9 for Plaintiff

10 WILLIAM M. LAFFERTY, ESQ.
11 D. McKINLEY MEASLEY, ESQ.
12 Morris, Nichols, Arsht & Tunnell LLP

13 -and-

14 W. BRANTLEY PHILLIPS, JR., ESQ.
15 JAMIE L. BROWN, ESQ.
16 of the Tennessee Bar
17 Bass Berry & Sims PLC
18 for Defendant Healthways, Inc. and the
19 Individual Defendants

20 S. MICHAEL SIRKIN, ESQ.
21 Ross, Aronstam & Moritz LLP

22 -and-

23 GREGORY J. MURPHY, ESQ.
24 of the North Carolina Bar
Moore & Van Allen PLLC
for Defendant SunTrust Bank

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1 THE COURT: Welcome, everyone.

2 MR. FRIEDLANDER: Good morning, Your
3 Honor.

4 THE COURT: Mr. Friedlander, how are
5 you?

6 MR. FRIEDLANDER: Very good, thank
7 you.

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

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

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

4 We put in our demand letter for
5 documents, pursuant to 220, in March of 2014 and, at
6 the time, there was a pending proxy contest led by an
7 11 percent stockholder. That proxy contest, I
8 suppose, was successful; three of the four nominees
9 were put on the board. So there were 3 dissidents out
10 of 11 on what was then a staggered board as of
11 June 2014. We filed our breach of fiduciary duty
12 complaint in June, on June 19th, and then we had the
13 motion to dismiss briefing and argument in October.

14 As of year-end 2014, this was a
15 company with about a \$700 million marketing cap. It
16 had \$231 million of long-term debt that potentially
17 could be accelerated if the proxy put was triggered.
18 And the company had current assets of about
19 \$162 million.

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

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

11 In terms of settlement terms, the key
12 term was the elimination of the dead hand proxy put.
13 Importantly, there is no payment of any fees to the
14 lenders in exchange for eliminating it. And the
15 company has also agreed that for any contracts of
16 \$20 million or above, that if there is any
17 change-of-control provisions that impacts the ability
18 to nominate or elect directors, that such provisions
19 will be explained to the board for at least the next
20 three years. And if there are any other contracts
21 outstanding, they will be reviewed and brought to the
22 board's attention.

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

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

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

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

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

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

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

21 (Laughter)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Supreme Court changes the law.

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

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

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

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

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

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

14 THE COURT: But if I did the reverse
15 calculation -- and, again, I know many people don't
16 like this way I think about it, either. But it's
17 helpful to me. It's helpful to me in terms of framing
18 these things. If I think about that you settled
19 early, so I'm going to think about sort of a 10 to
20 15 percent range of benefit, what your number comes to
21 is basically you conferred a 10 million to 15
22 million-ish benefit on the company.

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

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

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

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

2 MR. FRIEDLANDER: Well, for better,
3 for worse, I think EMAK forecloses that straight
4 monetary equivalent. I mean, because then we were
5 talking about a company -- you know, we didn't have
6 valuation experts, but you can argue -- in a range of
7 10 to \$50 million, even though the growth potential
8 was there. And the Supreme Court was very clear that
9 you can't just look at the monetary equivalent because
10 of the importance of voting rights and because you
11 would be creating all sorts of perverse incentives for
12 smaller cap companies to say, "Okay. Here, you want
13 to go litigate against me, but don't expect to be
14 compensated well for it."

15 So the Supreme Court didn't say there
16 was a corollary on the upper end. But when we start
17 thinking about Yahoo!, at the time, that was a
18 \$13 billion company. Carl Icahn is out there without
19 standing, and this allows him to finish his proxy
20 contest. That should be worth a heck of a lot of
21 money. But that's not a rationale that the Chancellor
22 applied in that case.

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

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

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

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

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

24 MR. FRIEDLANDER: Okay. Well, for

1 this size company, if you think about it, let's say
2 this was the meaningful motion practice and -- I mean,
3 not discovery; but there was 220, so there's informal
4 discovery or statutory discovery. So if we are in the
5 15 percent land, then -- everybody help me with my
6 math -- but this would be about -- so then the benefit
7 would be something less than \$15 million, I believe.
8 Right?

9 THE COURT: Yep.

10 MR. FRIEDLANDER: So \$15 million on a
11 \$700 million company, when you are talking about is
12 this a company that now has -- where someone was
13 impeded. And, also, it's a pretty large put. So the
14 put is pretty large. I think you can say it's a
15 pretty fair deterrent effect, given the acceleration.
16 And whatever people were hoping to get out of that, or
17 feared might come out of that, that I think we are
18 preserving a measure of accountability, whether or not
19 there's a contest. And if there's a contest, it's
20 enhancing the likelihood of a contest.

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

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

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

17 THE COURT: Thank you.

18 MR. FRIEDLANDER: It its current
19 situation, too.

20 THE COURT: Thank you.

21 MR. FRIEDLANDER: Thank you.

22 THE COURT: Anything from any of the
23 defendants?

24 MR. LAFFERTY: Your Honor, I represent

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

4 THE COURT: Welcome.

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

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

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

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

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

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

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

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

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

6 MR. LAFFERTY: I agree with you.

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

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

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

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

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

17 THE COURT: Great.

18 Anything else from anybody else?

19 MR. FRIEDLANDER: I hesitate to say
20 it, but I messed up the math. So 15 percent back on
21 1.2 would be \$8 million, not 15.

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

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

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

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

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

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

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

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

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

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

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

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

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

24 In addition to the Rule 23(e)

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

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

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

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

1 that the notice was sent, as directed by the Court, on
2 March 3rd. Garden City received a list from the
3 transfer agent containing information for registered
4 holders during the class period. This list contained
5 271 record holders. Garden City mailed to those
6 record holders, as well as to its own proprietary list
7 of 1,967 securities brokers, dealers, banks, and other
8 nominees. Garden City also caused the notice to be
9 published in the Investor's Business Daily and to be
10 transmitted over PR Newswire. In response to its
11 mailing to record holders and nominees, Garden City
12 obtained 20,125 additional names and addresses and
13 sent them copies of the notice. So, in my view,
14 notice was adequate.

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

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

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

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

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

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

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

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

6 Now, the reason I talk about that for
7 purposes of settlement is because what it means is
8 there were obstacles to the claims. The plaintiffs
9 might well not prevail on their claims. They had
10 claims that were meritorious when filed, but they were
11 claims that could be contested. Any claim for
12 monetary damages would have been subject to Section
13 102(b)(7) and 141(e) defenses. Particularly in terms
14 of SunTrust's liability, there would have been factual
15 disputes regarding the degree to which SunTrust
16 knowingly participated in the underlying misconduct,
17 assuming there was misconduct. It's one thing to draw
18 a permissible inference at the pleadings stage. It's
19 quite another thing to view a matter in the context of
20 actual discovery into what the negotiations and
21 discussions were.

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

1 think, is quite significant and ample. The plaintiffs
2 received what they could have achieved at trial
3 realistically. They obtained the elimination of the
4 proxy put from the credit agreement. SunTrust did not
5 receive a fee for eliminating this provision, which is
6 something that a lender might otherwise have asked
7 for. And I'm not saying otherwise should ask for, but
8 I'm saying it's something that lenders otherwise
9 frequently ask for. The plaintiffs also obtained the
10 institution of internal controls that will remain in
11 place for three years to prevent the unconsidered
12 adoption of change-in-control provisions in material
13 agreements, defined as contracts in excess of
14 \$20 million, as well as a review of all current
15 material contracts for change-of-control provisions.

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

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

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

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

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

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

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

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

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

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

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

1 situation where I would be paying somebody who
2 normally bills at \$100 an hour an implied rate of
3 \$2,000 per hour. In this case, the plaintiff's
4 counsel brought a particular expertise to bear.

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

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

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

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

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

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

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

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

17 (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