

Pontiac General Employees Retirement System v. Ballantine, et al.

COURT: Delaware Court of Chancery
CASE NUMBER: 9789-VCL

After an investigation, which included obtaining documents pursuant to a demand under section 220 of the Delaware General Corporations Law, Plaintiff commenced an action on June 19, 2014, against the Board of Directors of Healthways, Inc. (“Healthways”) and its lender, SunTrust Bank (“SunTrust”). The Complaint alleged that the members of the Board of Directors of Healthways breached their fiduciary duties to Healthways’ stockholders by agreeing to a credit agreement containing a “Dead Hand Proxy Put.” The Complaint further alleged that SunTrust aided and abetted the breaches of fiduciary duty by the members of the Healthways Board.

BLB&G has been at the forefront of challenging proxy put debt provisions since 2009 and has worked diligently to eliminate or curtail the use of these anti-shareholder provisions from the marketplace. Dead Hand Proxy Puts entrench incumbent Boards of Directors by restricting the ability of stockholders to nominate and elect new directors. If stockholders replace a majority of the Board, a Dead Hand Proxy Put allows the Company’s lenders to put the Company’s debt into default. This can have catastrophic consequences for a company and it improperly influences stockholder decisions concerning their well-established franchise rights. The Complaint alleged that the defendants added a Dead Hand Proxy Put just days after Healthways’ stockholders, against the recommendation of the Board, overwhelmingly voted to approve a precatory proposal to declassify the Board so that the entire Board would be up for re-election each year.

The Defendants filed motions to dismiss. The Board argued that the issue was not ripe because stockholders were not currently running a proxy contest. The Court denied Healthways’ motion to dismiss, ruling that Dead Hand Proxy Puts are akin to the ever-threatening specter of the “Sword of Damocles” and effectively deter stockholders from running a proxy contest due to the serious consequences a debt default may have. Prior to this action, no Proxy Put had ever been challenged outside of the context of a proxy contest. SunTrust moved to dismiss arguing that there was inadequate evidence pled that they aided and abetted the breaches of fiduciary duty by Healthways’ Board. The Court denied SunTrust’s motion to dismiss, finding that prior decisions from the Court, as well as publication of articles about those decisions, more than adequately put the bank on notice. This is the first action challenging a Proxy Put outside of the context of a proxy contest.

The [attached](#) public version of the complaint is redacted, as the complaint contains references to non-public Board minutes of Healthways. Also [attached](#) is the transcript of the oral argument on the motions to dismiss.

The parties have reached a proposed settlement in which the Company and the bank have agreed to eliminate the dead hand proxy put from the Company’s credit agreement. Stockholders are now free to elect the directors of their choosing, free of the concern that electing dissident directors could cause a catastrophic default of the Company’s debt. As such, the primary purpose of the lawsuit has been accomplished. A copy of the Stipulation and Agreement of Compromise, Settlement and Release entered into by the parties is available [here](#).

On May 8, 2015, Vice Chancellor J. Travis Laster of the Delaware Chancery Court entered a Final Order approving the Settlement.

Case Documents

- March 6, 2015 - Notice of Pendency and Proposed Settlement of Class Action
- February 20, 2015 - Scheduling Order
- February 11, 2015 - Stipulation and Agreement of Compromise, Settlement and Release
- October 14, 2014 - Oral Argument on Defendants' Motions to Dismiss and Rulings of the Court
- June 24, 2014 - Verified Class Action and Derivative Complaint