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Case No. 9789-VCL

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. 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.	C.A. No. 9789-VCL

OPENING BRIEF IN SUPPORT OF HEALTHWAYS, INC. AND INDIVIDUAL DEFENDANTS' MOTION TO DISMISS

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Defendants 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 (collectively the "Individual Defendants"), and Nominal Defendant Healthways, Inc. ("Healthways" or the "Company") (collectively, the "Defendants"), respectfully submit this Opening Brief in support of their Motion to Dismiss Pontiac's Verified Class Action.

PRELIMINARY STATEMENT

Citing newfound concerns about ***potential*** risks to the stockholders' franchise, Pontiac General Employees Retirement System ("Pontiac") brings this class and derivative action seeking to invalidate a "change in control" provision that is contained in Healthways' Fifth Amended and Restated Revolving Credit and Term Loan Agreement dated June 8, 2012 ("the 2012 Loan Agreement") (attached as Exhibit A)[1]. That provision – which has been a matter of public record for more than two years – admittedly has ***no impact*** on the parties or any stockholders ***today***. Indeed, this provision (or one like it) has been a feature of Healthways' credit facilities since 2006 and has remained dormant throughout that entire time without affecting the stockholder franchise in any way. Nonetheless, according to Pontiac, ***at some point in the future***, that provision ***could*** impair the

[1] *See Narrowstep, Inc. v. Onstream Media Corp.*, 2010 WL 5422405, at *5 (Del. Ch. Dec. 22, 2010) ("For example, a court may take judicial notice of the content of an SEC filing, but only to the extent that the facts contained in them are not subject to reasonable dispute.").

stockholder franchise ***if*** a number of highly speculative and contingent events were all to occur. Pontiac seeks an injunction against the Company's lenders that would bar them from enforcing the provision, a declaration that the provision is invalid and a declaration that the Individual Defendants breached their fiduciary duties in approving the 2012 Loan Agreement.

In an effort to justify this litigation, Pontiac compares this case to *San Antonio Fire & Police Pension Fund v. Amylin Pharmaceuticals, Inc.*, 983 A.2d 304 (Del. Ch. 2009) ("*Amylin*"). But, even as alleged in the Complaint, the facts in this case are materially different. In *Amylin*, the board of directors ***affirmatively invoked*** a change in control provision ***in the midst of a proxy contest*** for the ***express purpose*** of thwarting stockholders' efforts to effectuate a change in leadership. There have been no such entrenchment efforts in this case, and the Complaint does not allege otherwise. Moreover, there is no indication that the change in control provision can or will be triggered by events relating to the Company's 2015 annual meeting – which is some ***ten months away***.

The recent events discussed in the Complaint conclusively demonstrate this last point. Not even two months ago, three nominees put forward by Healthways' second largest stockholder were elected to the Board as a part of a negotiated resolution of a proxy contest. The Board did not invoke the change in control provision at any point in this proxy contest, and its willingness to negotiate with its

stockholders regarding the composition of the Board evidences a sincere desire to act in good faith and the stockholders' best interests and avoid costs or disruptions associated with potential proxy solicitations or contests.

Given that ***none*** of the events that must occur before the change of control provision can be triggered have happened – ***and may never happen*** – it is clear that Pontiac's claims are not ripe and do not present a live case or controversy over which this Court may exercise jurisdiction. Pontiac also lacks standing, as it has yet to experience any sort of injury-in-fact for this Court to redress. Pontiac's claims, therefore, must be dismissed as a matter of law.

FACTUAL BACKGROUND

The Parties

Healthways is a Delaware corporation headquartered in Franklin, Tennessee. The Company is a leading provider of a comprehensive array of specialized products and services that are designed to help people maintain and improve their health and, as a result, reduce their overall healthcare costs. The Company provides services to health plans, governments, employers and hospitals throughout the United States, Brazil, Australia and France.

Of the ten Individual Defendants, eight currently serve as directors on the Healthways Board.[2] Individual Defendants John W. Ballantine and C. Warren Neel are former directors of the Company, who served on the Board at the time the Company entered into the 2012 Loan Agreement.

Pontiac General Employees Retirement System claims to be a stockholder of Healthways both now and at all times relevant to the allegations in its Complaint. Records indicate that Pontiac owns 18,789 shares of Healthways' common stock – a stake equal to one-half of one-tenth of one percent (0.05%) of the Company.

The 2012 Loan Agreement

On or about June 8, 2012, Healthways entered into the 2012 Loan Agreement with a syndicate of lenders, including SunTrust Bank, which acted as the syndicate's "administrative agent" (the "2012 Loan Agreement"). The 2012 Loan Agreement contains a change in control provision that provides as follows:

> **"*Change in Control"*** shall mean the occurrence of one or more of the following events: (a) any sale, lease, exchange or other transfer (in a single transaction or a series of related transactions) of all or substantially all of the assets of the Borrower to any Person or "group" (within the meaning of the Securities Exchange Act of 1934 and the rules of the Securities and Exchange Commission thereunder in effect on the date hereof), (b) the acquisition of ownership, directly or indirectly, beneficially or of record, by any Person or "group" (within the meaning of the Securities Exchange Act of 1934 and the rules of the Securities and Exchange Commission thereunder as in

[2] These persons include J. Cris Bisgard, Mary Jane England, Ben R. Leedle Jr., William D. Novelli, Alison Taunton-Rigby, Donato Tramuto, John A. Wickens and Kevin Wills.

> effect on the date hereof) of 35% or more of the outstanding shares of the voting Capital Stock of the Borrower; or (c) ***during any period of 24 consecutive months, a majority of the members of the board of directors or other equivalent governing body of the Borrower cease to be composed of individuals who are Continuing Directors.***

2012 Loan Agreement (Ex. A at 6) (emphasis added) (the "CIC Provision"). Under Section 8.1(m) of the 2012 Loan Agreement, any such change in control constitutes an "event of default," which, in turn, triggers the lending syndicate's right to terminate the Company's loans and other credit facilities and to declare them immediately due and payable.

Pontiac's alleged concerns focus solely on subpart (c) of the CIC Provision, which provides that a change in control (and, thus, an event of default) occurs if a majority of the Board fails to qualify as "Continuing Directors," which the 2012 Loan Agreement defines as follows:

> ***"Continuing Directors"*** shall mean, with respect to any period, any individuals (A) who were members of the board of directors or other equivalent governing body of the Borrower on the first day of such period, (B) whose election or nomination to that board or equivalent governing body was approved by individuals referred to in clause (A) above constituting at the time of such election or nomination at least a majority of that board or equivalent governing body, or (C) whose election or nomination to that board or other equivalent governing body was approved by individuals referred to in clauses (A) and (B) above constituting at the time of such election or nomination at least a majority of that board or equivalent governing body (excluding, in the case of both clauses (B) and (C), any individual whose initial nomination for, or assumption of office as, a member of that board or equivalent governing body occurs as a result of an actual or threatened solicitation of proxies or consents for the election or removal of one or more directors by any person or group other than a solicitation for the

> election of one or more directors by or on behalf of the board of directors).

2012 Loan Agreement (Ex. A at 8). Essentially, the "Continuing Directors" are (i) those persons who were on the Board at the time the 2012 Loan Agreement was executed ("Original Directors"); (ii) those persons who were elected or nominated by Original Directors ("Approved Directors"); (iii) those persons who are elected or nominated by the Original Directors and Approved Directors; or (iv) any director that has served on the Board longer than the 24-month period referenced in subpart (c) of the CIC Provision. The Continuing Director definition excludes (i) any board members who gained his or her seat as the result of an actual or threatened proxy contest (a "Dissident Director"); or (ii) any directors elected or nominated by a Dissident Director.

The 2012 Loan Agreement will remain in effect for, at most, five years. Consequently, absent a replacement credit facility, all of its terms – including the CIC Provision – will expire on June 8, 2017. Most likely, the 2012 Loan Agreement will have expired before Healthways holds its June 2017 annual meeting.[3] Thus, there are only two ***future*** meetings of the stockholders – the 2015

[3] The 2014 Annual Meeting of stockholders was held on June 24, 2014. Given that annual meetings are scheduled approximately 12 months apart (consistent with 8 *Del. Code §* 211 and certain provisions in the Standstill Agreement discussed below), it is reasonable to assume that the next three annual meetings will occur in late June 2015, late June 2016 and late June 2017. *See Airgas, Inc. v. Air Prod. & Chems., Inc.*, 8 A.3d 1132, 1194 n.34 (Del. 2010)

and 2016 annual meetings – at which subpart (c) of the CIC Provision ***might*** be relevant.

The Healthways Board

The Healthways Board of Directors consists of 11 directors that, historically, served for three-year terms. At present, the Board is divided into three classes:

Class One Directors (2013 – 2016)	***Class Two Directors*** (2014 – 2015)	***Class Three Directors*** (2012 -2015)
Ben R. Leedle, Jr.	Paul H. Keckley	J. Cris Bisgard
Alison Taunton-Rigby	Conan J. Laughlin	May Jane England
Donato Tramuto	Bradley S. Karro	John A. Wickens
-	Kevin G. Wills	William D. Novelli

As noted in the Complaint, Healthways is in the process of declassifying its Board. Contrary to the allegations in the Complaint, however, the Healthways Board recommended a vote in favor of the proposal to declassify the Board. *See* Healthways, Inc. S.E.C. Schedule 14A Proxy Statement, dated April 30, 2013.

The Class Two directors will go through the declassification process first. Each was elected for a one-year term at the June 2014 annual meeting and will face election again in June 2015. At that time, the Class Two directors (or nominees in their stead) will join the Class Three directors (or nominees in their stead) on the June 2015 annual meeting ballot and vie for eight open seats. The declassification

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(recognizing that "Delaware corporations have some latitude in setting the date for an annual meeting," which may result in directorship terms that are approximate, rather than exactly measured).

process will be complete in June 2016, when all 11 directors (or nominees in their stead) will stand for election to a one-year term for the first time.

Currently, 8 of the 11 directors qualify as Continuing Directors. Three members of the Board – Paul H. Keckley, Conan J. Laughlin and Bradley S. Karro – were elected less than two months ago at the June 2014 annual meeting. These newly elected directors do not qualify as Continuing Directors, as their election resulted from a Board-negotiated resolution of a proxy contest involving stockholder North Tide (the "North Tide Directors").[4]

North Tide

At the end of 2013, North Tide issued a series of public letters criticizing the Board and indicated its interest in pursuing a potential proxy contest. In mid-January 2014, North Tide announced that it would consider nominating a slate of director candidates for election at the June 2014 Annual Meeting. Thereafter, the Company and North Tide attempted without success to negotiate a resolution of North Tide's concerns.

On March 31, 2013, North Tide filed a preliminary proxy statement that proposed four director nominees for the June 2014 annual meeting. On May 13, 2014, North Tide filed its definitive proxy statement announcing its slate of four

[4] "North Tide" is a collective description for three affiliated investors: North Tide Capital Master, LP; North Tide Capital, LLC and Conan J. Laughlin. Together, North Tide owns nearly 11% of the Company's outstanding shares of common stock.

director candidates and soliciting proxies for their election. The Company subsequently engaged in further negotiations with North Tide, which culminated in the resignation of three sitting directors (Daniel Englander and Defendants Ballantine and Neel) and the Company's agreement to replace them with three North Tide nominees prior to the June 2014 annual meeting. In exchange, North Tide withdrew its proxy materials, ended its solicitation of proxies and entered into a Standstill Agreement with the Company.

The Standstill Agreement

On June 2, 2014, the Company and North Tide executed a Nomination and Standstill Agreement (the "Standstill Agreement") (attached as Exhibit B), wherein the Company agreed to nominate three director candidates proposed by North Tide for election as Class Two directors at the June 2014 annual meeting. In exchange, North Tide agreed not to seek, advise, encourage or influence the voting of other stockholders. North Tide also agreed not to acquire more than a 15% stake in Healthways and said it would not assist in any tender offer, exchange offer, merger or other extraordinary transaction involving the Company. The Standstill Agreement will remain in effect for approximately 12 months.[5] The Standstill Agreement will be extended for an additional 12 months ***if*** the Company re-nominates the North Tide Directors in 2015 with North Tide's consent.

[5] More specifically, unless extended, the Standstill Agreement will expire 10 days prior to the 2015 annual meeting deadline for director nominations.

Pontiac's Section 220 Demand & The Current Lawsuit

On March 20, 2014, Pontiac served a Section 220 Demand Letter on the Company seeking to inspect the books and records of the Company relating to the 2012 Loan Agreement. The Company responded promptly by producing several categories of documents over several weeks. Immediately following the completion of the Company's production, and without further requests or negotiations, Pontiac filed its Complaint.

ARGUMENT& AUTHORITY

I. PONTIAC'S CLAIMS ARE NOT RIPE.

The Supreme Court of Delaware recently explained the threshold requirements that must be satisfied in order for a case to be justiciable. Specifically, in *XL Specialty Ins. Co. v. WMI Liquidating Trust*, 93 A.3d 1208 (Del. 2014), the Supreme Court made clear:

> For an 'actual controversy' to exist, the following four prerequisites must be satisfied: (1) [i]t must be a controversy involving the rights or other legal relations of the party seeking declaratory relief; (2) it must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) the controversy must be between parties whose interests are real and adverse; (4) ***the issue involved in the controversy must be ripe for judicial determination***.

Id. at 1217 (quoting *Stroud v. Milliken Enters., Inc.*, 552 A.2d 476, 479-80 (Del. 1989)) (emphasis added). Concerning the concept of ripeness, in particular, the Supreme Court went on to explain:

> Generally, a dispute will be deemed ripe if litigation sooner or later appears to be unavoidable and where the ***material facts are static***. ***Conversely, a dispute will be deemed not ripe where the claim is based on uncertain and contingent events that may not occur, or where future events may obviate the need for judicial intervention***.

XL Specialty Ins. Co., 93 A.2d at 1217-18 (internal quotations omitted) (emphasis added).

It is axiomatic that, in the absence of a ripe claim, this Court does not have jurisdiction. "Courts in this country generally, and in Delaware in particular, decline to exercise jurisdiction over cases in which a controversy has not yet matured to a point where judicial action is appropriate." *Stroud v. Milliken Enters., Inc.*, 552 A.2d 476, 480 (Del. 1988); *see also XL Specialty Ins. Co.*, 93 A.2d at 1217 ("Delaware courts decline to exercise jurisdiction over a case unless the underlying controversy is ripe, *i.e.*, has 'matured to a point where judicial action is appropriate'") (quoting *id.*); *Bebchuk v. CA, Inc.*, 902 A.2d 737, 740 (Del. Ch. 2006) ("Ripeness, the simple question of whether a suit has been brought at the correct time, ***goes to the very heart*** of whether a court has subject matter jurisdiction.") (emphasis added).

In view of this authority, it is clear that Pontiac's claims are not ripe for judicial determination at this time, and that they will not be so for ***at least*** many, many months to come – if ever. Indeed, in this case, there is a trove of "uncertain and contingent events that may not occur." And, it is undeniable that "future

events" may very well "obviate the need for judicial intervention." *XL Specialty Ins. Co.*, 93 A.3d at 1218.

A. Pontiac's Claims Will Ripen *Only* If "Uncertain and Contingent" Events Occur.

Given that the Healthways Board currently consists of a majority of Continuing Directors, there can be no argument that the CIC Provision has any relevance today. Rather, as even Pontiac concedes, the election of directors at the 2015 annual meeting – some ***ten months*** from now – is the first time the CIC Provision could possibly come into play. Whether that will occur, however, is impossible to predict with any accuracy and depends entirely on the composition of the possible nominees. The following scenarios highlight the long series of "uncertain and contingent events" that must occur before any of Pontiac's claims can ripen.

Scenario One: North Tide Directors Continue.

For example, if the North Tide Directors are re-nominated for the June 2015 ballot with North Tide's consent, the Standstill Agreement will be extended automatically for another 12 months and will not expire until mid-2016.[6] In that

[6] This scenario assumes that North Tide will continue to hold at least 3% of the Company's outstanding common stock, thereby preserving its right to maintain the North Tide directorships pursuant to the Standstill Agreement. If North Tide sells its shares, the Standstill Agreement allows the Board to replace at least one North Tide Director by majority vote pursuant to the Bylaws. By definition, any such replacement for a North Tide Director would be a "Continuing Director."

event, the CIC Provision could impose on the stockholder franchise in June 2015 ***only*** if ***all*** of the following occur:

- The North Tide Directors are re-nominated; ***and***
- A stockholder other than North Tide (the "Nominating Stockholder")[7] proposes at least three candidates for the Board's consideration; ***and***
- The Board rejects at least three of the Nominating Stockholder's proposed nominees; ***and***
- The Nominating Stockholder threatens and/or launches a proxy contest seeking election of at least three candidates.

No harm could result from the implication of the CIC Provision until these further events unfold:

- The North Tide Directors are re-elected; ***and***
- The Nominating Stockholder wins the proxy contest and seizes at least three open seats; ***and***
- The Board and the lending syndicate reach an impasse regarding a waiver of the June 2012 Loan Agreement's CIC Provision;[8] ***and***

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[7] North Tide is the Company's second largest stockholder as of June 30, 2014. Stockholders with smaller stakes in the Company do not have the same incentive to propose their own dissident slates. Regardless, it is unlikely that these smaller stockholders could or would be able to propose and elect a majority of non-Continuing Directors that would trigger the CIC Provision.

- The lending syndicate elects in their discretion to invoke Section 8.1 of the 2012 Loan Agreement to declare an Event of Default.

Scenario Two: North Tide Directors Do Not Continue.

If, however, the North Tide Directors are not re-nominated to the Board in 2015, the CIC Provision could impose on the stockholder franchise at the June 2015 annual meeting ***only*** if ***all*** of the following occur:

- North Tide, or North Tide together with other stockholders, proposes ***at least*** six nominees to the Board; ***and***

- The Board rejects ***at least*** six of these nominees; ***and***

- North Tide, together with other stockholders, threatens and/or launches a proxy contest for ***at least*** six of the eight open seats.

No harm could result from the implication of the CIC Provision until these further events unfold:

- The North Tide/stockholder-proposed dissident slate wins the proxy contest, seizing six out of eight open seats on the Board; ***and***

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[8] The possibility that the Company would be unable to obtain a waiver or consent from its syndicate of lenders is remote, as highlighted by Vice Chancellor Lamb in *Amylin:* "Such restrictive provisions are somewhat ***less concerning in syndicated lending agreements*** than they are in public debt instruments because of ***the relative ease with which consents or waivers are obtained in bank lending*** than in public debt instruments." *Amylin,* 983 A.2d at 315 n.30 (emphasis added).

- The Board and its syndicate of lenders reach an impasse regarding a waiver of the June 2012 Loan Agreement's CIC Provision;[9] ***and***

- The lending syndicate elects in their discretion to invoke Section 8.1 of the 2012 Loan Agreement to declare an Event of Default.

Again, it is impossible to know now if either of these two scenarios will unfold, and it would be disingenuous for Pontiac to ask this Court to assume differently. After all, any assumptions should be in favor of concluding that an "event of default" is not likely given this Court's recognition of "the ***relative ease*** with which consents or waivers are obtained in bank lending[.]" *Amylin*, 983 A.2d at 315 n.30 (emphasis added). Regardless, given all of this undeniable uncertainty, there can be no legitimate claim that Plaintiff's claims are ripe, and they must be dismissed as a matter of law. *See Bebchuk*, 902 A.2d at 740 (if "the claim depends on uncertain and contingent events that may not occur as anticipated, or may not occur at all" such a claim is not ripe); *Wells Fargo v. First Interstate Bancorp*, 1996 WL 32169, at *8 (Del. Ch. Jan. 18, 1996) (holding that allegations "directed speculatively to future states of the world" were not ripe).

[9] *See* n.8 at 14 *infra* discussing *Amylin*.

B. <u>There Is No Imminent Harm To Pontiac Or Any Other Stockholder.</u>

Given the undisputed fact that the CIC Provision does not pose any threat to the stockholder franchise today, Pontiac will argue in favor of an "imminent harm" test for ripeness and point to the recent addition of the North Tide Directors as proof that there is some potential for the CIC Provision to be triggered in coming months. Putting aside that there is nothing "imminent" about this, it simply is not true. Pursuant to the Standstill Agreement and the declassification of the Healthways Board, those same three non-Continuing Directors will be up for election again in 2015. If they are not re-elected, the number of non-Continuing Directors could be reset to ***<u>zero</u>***.

As the foregoing authority makes clear, this Court may exercise subject matter jurisdiction ***only*** if litigation is unavoidable ***and*** "the material facts are static." *Bebchuk*, 902 A.2d at 740. In this case, Pontiac ***concedes*** in the Complaint that it cannot satisfy this necessary prerequisite, and that there is no imminent harm or injury:

- Declassifying the Board "makes it ***more likely*** the Proxy Put ***will be*** triggered … ***starting in*** [summer] ***2015***" (Compl. ¶ 37);
- "***if*** more than half of the incumbent Board is replaced through a contested election or threatened contested election, the lenders under

the Loan Agreement ***may***, through the administrative agent, declare a default" (*id.* ¶ 40);

- "Healthways ***risks*** default under the Loan Agreement ***if*** a majority of the Board during any given twenty-four (24) month period consists of stockholder nominees or similar insurgents" (*id.* ¶ 45);
- "***should*** any stockholder wage *a* ***successful*** *proxy fight …* ***that results in the election of a majority of new directors***, such an election ***would be*** an Event of Default…" (*id.* ¶ 49);
- "there ***can be no assurance*** that lenders will agree to a waiver of their default rights for any fee" (*id.* ¶ 50);
- "Although the current staggered nature of Healthways' Board ***makes it impossible*** to trigger the Dead Hand Proxy Pout solely by the election of the North Tide directors at the upcoming annual meeting, it necessarily must be a factor stockholders ***will consider*** in placing their votes. Three (3) out of eleven (11) directors will not be Continuing Directors as defined in the Loan Agreement. ***At that point, should*** three (3) of the other directors ***happen*** to resign, die or be replaced, an

Event of Default will have occurred under the Loan Agreement." (*id.* ¶ 71);[10]

- "***If*** stockholders want to change a majority of the Board…" (*id.* ¶ 72);
- "The stockholders ***may be*** forced to vote for incumbent directors whose policies the stockholders reject…." (*id.*¶ 74).

Thus, this Court should follow the many cases holding that when there is no "reason to believe that the [] issue would inevitably arise, nor any compelling justification to rule in advance," the Court must wait for the facts to crystalize before allowing the claims to proceed. *Bebchuk*, 902 A.2d at 741.

C. The Ripeness Analysis in *Amylin* Supports Dismissal.

Pontiac repeatedly cites *Amylin* as controlling authority. *Amylin*, however, involved facts demonstrably and materially different from those presented here. And, even in *Amylin*, concerns about ripeness prompted the Chancery Court to dismiss some of the plaintiff's claims relating to ***future*** director elections.

In *Amylin*, the activist stockholder, Eastbourne Capital Management LLC ("Eastbourne"), went to great lengths to reach a non-litigation resolution prior to

[10] Paragraph 71 reflects Pontiac's misunderstanding of the Continuing Director provision. If three directors "happen to resign, die or be replaced[,]" then they will be replaced by a majority vote of the Board according to the Bylaws. Any such replacement directors will qualify as a Continuing Director pursuant to subpart (b) of the Continuing Director definition. Given the mix of the current Board, a death, resignation or removal is not likely to alter the mix of Continuing and non-Continuing Directors of the present Board and will not trigger an Event of Default.

filing a lawsuit. This included notice to the Amylin board of directors of its intent to initiate a proxy contest; documenting with the board Eastbourne's concerns about the legitimacy of the change in control provision at issue there; and a demand to the board to avoid triggering that provision by, *inter alia*, asking that the company work with its lender to obtain a waiver. *See Amylin,* 983 A.2d at 309-10. Eastbourne filed suit only ***after*** it became clear that the Amylin board would invoke the change of control provision to block Eastbourne's efforts.[11]

By stark contrast, there is no ongoing proxy contest – actual or threatened – in this case. The Healthways Board has ***never*** invoked the CIC Provision or threatened to use it in a coercive or threatening manner – either in connection with

[11] In response to Eastbourne, Amylin issued a public statement that was specifically intended to highlight the adverse financial impact that would result if its stockholders acted in a way that would implicate the change in control provision: "If … our Board of Directors ceases to be composed of the existing directors or other individuals approved by a majority of the existing directors, then a 'change of control' … will be triggered. If triggered, the lenders under the Term Loan may terminate their commitments and accelerate our outstanding debt… We may not have the liquidity or financial resources to do so at the times required *or at all.* If a proxy contest results from one or both notices received from the Icahn Group or Eastbourne … our business could be adversely affected…." and "would be required to immediately pay back as much as $915 million." *Amylin,* 983 A.2d at 310 n.7. Healthways has never engaged in such tactics, and nothing in the Complaint alleges otherwise.

a proxy contest or otherwise.[12] And, Pontiac has made no effort to work with the Board to resolve its concerns without litigation.

Even in *Amylin,* on the much different facts of that case, the Court did not issue a permanent injunction enjoining the lender from enforcing the change of control provision. Instead, the court found that the application of that provision was rendered moot with respect to Eastbourne's proxy contest because a one-time waiver was obtained from the indenture trustee, and any claims regarding the impact of the provision on future elections were held to be unripe. "[T]he issue of Continuing Directors may become irrelevant long before next year's annual stockholder meeting." *Id.* at 317; *see also id.* at 313 (acknowledging that determination as to whether the dissident slate would constitute "Continuing

[12] For this reason and others, Pontiac's attempts to compare this case to *Kallick v. SandRidge Energy, Inc.*, 68 A.3d 242 (Del. Ch. 2013) are totally misplaced. Indeed, compared to this case, the facts of SandRidge are even more divergent than *Amylin.* The *SandRidge* case came about in the midst of a "serious proxy fight" for *every* seat on the SandRidge board. *Id.* at 244. The SandRidge board "energetically campaigned" against the ongoing proxy solicitation and "warned its stockholders twice in SEC filings that triggering the Proxy Put would be 'extreme' and 'risky[,]'" and that the company might not have sufficient liquidity to meet its obligations if the provision was triggered. *Id.* at 245, 250. Throughout the proxy contest, the SandRidge board steadfastly refused to approve other nominees based solely on the nominees' purported lack of relevant experience. Simply put, in *SandRidge*, the board affirmatively invoked and actively attempted to exploit the change of control provision at issue there in order to preserve its incumbency. Again, in stark contrast, no such facts are present here. Healthways is not in a proxy contest and cannot be for at least three fiscal quarters. Healthways has never invoked the CIC Provision nor "warned its stockholders" that it might do so. Finally, Healthways has not exhibited an unwillingness to negotiate with its stockholders about their concerns.

Directors" if elected, would "have a significant effect on *next year's* annual stockholder meeting[,]" but had no bearing on the election at hand). The Court told the parties to return ***if and when*** a judicial determination was necessary: "[T]he Plaintiff or Amylin is free after the 2009 annual meeting to replead its case that the stockholder nominees, ***if they are in fact elected***, are Continuing Directors by virtue of Amylin's 'approval,' whatever form that approval may ultimately take. At that point, the relevant facts will be frozen…." *Id.* at 317-18 (emphasis added).

Because all of the relevant facts are still in flux, this reasoning from *Amylin* applies with equal force in this case. Indeed, none of the relevant facts are "frozen" here. This Court, therefore, has no basis to exercise jurisdiction at the present time and should dismiss Pontiac's claims.

II. PONTIAC DOES NOT HAVE STANDING TO ASSERT ITS CLAIMS.

In addition to Pontiac's claims not being ripe for consideration by this Court, Pontiac lacks standing to pursue its claims because it has not yet suffered "a redressable injury." *In re Career Educ. Corp. Derivative Litig.*, 2007 WL 2875203, at * 9 (Del. Ch. Sept. 28, 2007). Standing is assessed "at the time the action is commenced," not at some indeterminate time in the future. *Schoon v. Smith*, 953 A.2d, 196, 200 (Del. 2008).

The concepts of standing and ripeness are related, and "[i]t is sometimes argued that standing is about ***who*** can sue while ripeness is about ***when*** they can

sue, though it is of course true that if no injury has occurred, the plaintiff can be told either that *she* cannot sue, or that she cannot sue *yet*." *Anonymous v. State*, 2000 WL 739252, at *4 n.23 (Del. Ch. June 1, 2000) (quoting *Presbytery of New Jersey of the Orthodox Presbyterian Church v. Florio*, 40 F.3d 1454, 1462 (3d Cir. 1994)). *See also Slaughter v. Aon Consulting, Inc.*, 2012 WL 1415772, at *1 (Del. Super. Jan. 31, 2012) ("Plaintiffs do not have standing to maintain a claim. . . because they have not alleged Defendants' breach actually caused an injury in fact. At best, Plaintiffs have alleged a reasonable fear of future possible harm. That, however, does not amount to actionable injury, as the law stands now.").

For essentially the same reasons that Pontiac's claims are not yet ripe, Pontiac lacks standing because it has not yet suffered any injury. The mere existence of the CIC Provision does not cause Pontiac harm. Nor does the "reasonable fear of future possible harm" that may be caused by the CIC Provision. Rather, Pontiac must show that the CIC Provision has actually impaired its stockholder franchise or otherwise imminently threatens to do so. Until then, Pontiac has not suffered a concrete injury-in-fact and lacks standing to assert its claims, which must be dismissed.

CONCLUSION

For the foregoing reasons, Pontiac's Verified Class Action and Derivative Complaint should be dismissed in its entirety.

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of August, 2014, the foregoing was served by File & ServeXpress, on the following attorneys of record:

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