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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, ALLISON 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 DEFENDANT SUNTRUST BANK'S MOTION TO DISMISS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

INTRODUCTION

This putative class action challenges the change-of-control provisions in a $400 million credit and loan agreement (the "Credit Agreement"). The Credit Agreement was negotiated at arm's-length between Healthways, Inc. and SunTrust Bank as the Administrative Agent for the lending bank group. The sole claim against SunTrust, set forth in conclusory fashion in the complaint, is that by allowing the change-of-control provisions to remain in the Credit Agreement without major concessions from the bank group, SunTrust aided and abetted a breach of fiduciary duty by the Healthways Board of Directors. This claim cannot withstand scrutiny under the stringent standard for aiding and abetting because it ignores this Court's repeated holdings that arm's-length bargaining by a third party is legally privileged and cannot give rise to aiding and abetting claims.

Plaintiff fails to allege facts sufficient to meet the required elements of an aiding and abetting claim. Instead, Plaintiff sprinkles a few conclusory allegations related to SunTrust in its complaint that do not reveal any factual basis for its claim. Critically, there are no allegations that SunTrust had any direct contact with the Board, nor is there any allegation that SunTrust inappropriately colluded with Healthways to include the change-of-control provisions. There are, therefore, no legally cognizable facts that would support the required element of knowing participation.

Just as an acquiror cannot be held liable for aiding and abetting simply because it bargained hard to buy a Delaware corporation for too low a price, a lender cannot be held liable for aiding and abetting simply because it bargained for a provision that, because of contextual facts unique to a borrower, could implicate the fiduciary duties of the borrower's directors. Delaware law applies the same rules to credit agreements as to other contracts, including merger agreements, and third-party lender liability therefore is governed by the same legal principles that govern the element of knowing participation in the M&A context.

Viewed through this lens, the complaint's lack of sufficient, non-conclusory allegations against SunTrust supports dismissal of the aiding and abetting claim.

ARGUMENT

I. PLAINTIFF FAILS TO PLEAD A VALID CLAIM OF AIDING AND ABETTING A BREACH OF FIDUCIARY DUTY.

A. Procedural Standard

On a motion to dismiss under Court of Chancery Rule 12(b)(6), the Court "must accept all well-pled allegations of specific facts as true and draw all reasonable inferences in favor of the plaintiff." *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1032 (Del. Ch. 2012). The motion should be granted if the "plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances." *Id.* (quoting *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 535 (Del. 2011)) (internal quotation marks omitted). Important here, the Court is "only required to accept those reasonable inferences that flow 'logically' from the non-conclusory facts pled in the complaint" and is "not required to accept 'every strained interpretation of the allegations proposed by the plaintiff.'" *Id.* (quoting *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001)).

B. Plaintiff's conclusory allegations as to knowing participation are insufficient as a matter of law because SunTrust bargained on its own behalf at arm's length.

To state a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must plead facts establishing: "(1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty, . . . (3) knowing participation in that breach by the

defendants, and (4) damages proximately caused by the breach." *Malpiede*, 780 A.2d at 1096 (alteration in original) (internal quotation marks and citation omitted). Although the record would show that other elements are lacking as well,[1] this motion is focused on knowing participation.

"To plead knowing participation adequately, the Plaintiff must allege facts that [SunTrust] directly 'sought to induce the breach of a fiduciary duty' or 'make factual allegations from which knowing participation may be inferred.'" *In re BJ's Wholesale Club, Inc. S'holders Litig.*, 2013 WL 396202, at *14 (Del. Ch. Jan. 31, 2013) (quoting *In re Telecomms., Inc. S'holders Litig.*, 2003 WL 21543427, at *2 (Del. Ch. July 7, 2003)).

"[T]his Court has consistently held that evidence of arm's-length negotiation with fiduciaries negated a claim of aiding and abetting, because such evidence precludes a showing that the defendants knowingly participated in the breach by the fiduciaries." *In re Gen. Motors (Hughes) S'holder Litig.,* 2005 WL 1089021, at *24 (Del. Ch. May 4, 2005), *aff'd*, 897 A.2d 162 (Del. 2006); *see also Malpiede*, 780 A.2d at 1098 ("[A]rm's-length negotiations are inconsistent with participation in a fiduciary breach."); *Frank v. Elgamal*, 2012 WL 1096090, at *12 (Del. Ch. Mar. 30, 2012) (dismissing aiding and abetting claim because nothing in the

[1] For example, if Plaintiff has failed to state a claim for the underlying breach of fiduciary duty, there can be no valid aiding and abetting claim against SunTrust.

complaint suggested that the transaction "was anything other than an arm's-length transaction"); *Morgan v. Cash*, 2010 WL 2803746, at *8 (Del. Ch. July 16, 2010) (noting "the long-standing rule that arm's-length bargaining is privileged and does not, absent actual collusion and facilitation of fiduciary wrongdoing, constitute aiding and abetting").

The Credit Agreement was negotiated at arms' length, and the complaint does not allege anything to the contrary. The Credit Agreement is a standard corporate credit and loan agreement through which the bank group provides Healthways $400 million in credit. Plaintiff has not alleged any improper contacts or relationships between the parties, much less collusive conduct in relation to the change-of-control provisions of the Credit Agreement. Moreover, Plaintiff pleads no facts to demonstrate that SunTrust and the Healthways directors ever had contact or communication of any kind with regard to the Credit Agreement.

Unable to allege anything other than arm's-length bargaining, Plaintiff's claim against SunTrust is not reasonably conceivable. Plaintiff alleges "Lenders aided and abetted the Board's breach by including a contractual provision that they knew or should have known was invalid," supposing that the "lender community" was put on notice that these types of provisions were "likely" violative of fiduciary duties owed to a borrower by its directors. Compl. ¶ 57. By allowing the provision to remain in the Credit Agreement, therefore, without granting

concessions against its own interest, SunTrust allegedly aided and abetted a breach of fiduciary duty by the board. *Id.* These types of allegations are insufficient to show knowing participation. *See Weil v. Morgan Stanley DW Inc.*, 877 A.2d 1024, 1039 (Del. Ch. 2005) (rejecting allegation that alleged aider and abettor "must have known" of a factually distinguishable Delaware Supreme Court decision for purposes of knowing participation element of aiding and abetting claim), *aff'd*, 894 A.2d 407 (Del. 2005); *see also In re NYMEX S'holder Litig.*, 2009 WL 3206051, at *12 (Del. Ch. Sept. 30, 2009) (deciding that plaintiffs' conclusory assertion that "[a]s participants," defendant acquirors "are aware of the Director Defendants' breaches of fiduciary duties and in fact actively and knowingly encouraged and participated in said breaches in order to obtain the substantial financial benefits that the Acquisition would provide at the expense of NYMEX's stockholders" is insufficient to state an aiding and abetting claim).

And, the change-of-control provisions are neither uncommon nor *per se* unenforceable, and there is no well-pled allegation of fact that SunTrust believed that the provisions were unlawful.[2] Tellingly, both of the Court of Chancery decisions that Plaintiff claims put the lender community on notice acknowledge a creditor's legitimate interests in including change-of-control provisions in its credit

[2] The Credit Agreement is governed by New York law, further distancing SunTrust from imputed knowledge of the Delaware court decisions cited by Plaintiff.

agreements. *See Kallick v. Sandridge Energy, Inc.*, 68 A.3d 242, 258 (Del. Ch. 2013) (A change-of-control provision "might have a legitimate purpose of protecting creditors who in fact insisted on its inclusion for their own good-faith reasons."); *San Antonio Fire & Police Pension Fund v. Amylin Pharms., Inc.*, 983 A.2d 304, 315 n.30 (Del. Ch. 2009) ("[I]t seems reasonable to conclude that [the creditor], as an objective third party, read the Indenture provision to be less restrictive than its own model covenant and desired the greater restriction its own model provision provided. 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."), *aff'd*, 981 A.2d 1173 (Del. 2009).

Likewise, both decisions acknowledge that the change-of-control provisions are permissible in certain circumstances. *See Sandridge*, 68 A.3d 242, 260-61 ("By contrast, where an incumbent board cannot identify that there is a specific and substantial risk to the corporation or its creditors posed by the rival slate, and approval of that slate would therefore not be a breach of the contractual duty of good faith owed to noteholders with the rights to the Proxy Put, the incumbent board must approve the new directors as a matter of its obligations to the company and its stockholders, even if it believes itself to be better qualified and have better

plans for the corporation than the rival slate."); *Amylin*, 983 A.2d at 307 ("Instead, construed in accordance with generally applied standards, the provision is properly understood to permit the incumbent directors to approve as a continuing director any person, whether nominated by the board or a stockholder, as long as the directors take such action in conformity with the implied covenant of good faith and fair dealing and in accordance with their normal fiduciary duties.").

Further, Plaintiff's own complaint contains a telling admission: It acknowledges that these types of provisions are appropriate if the borrower obtains "economic benefits" in exchange. Compl. ¶ 96.

Thus, while Plaintiff's oft-quoted "Proxy Put" cases caution directors and their advisors to scrutinize restrictive provisions in credit agreements, neither of these decisions broadcasts a decree that including such provisions in credit agreements, without more, constitutes a breach of duty. As a result, these cases (and Plaintiff's admission) undercut Plaintiff's conclusory allegation that the lender community was somehow "on notice" that merely including change-of-control provisions violates a borrowing board's fiduciary duties, and thereby exposes lenders to secondary liability. Without more, the typical arm's-length nature of the lending transaction therefore belies an aiding and abetting claim against SunTrust and supports dismissal. *See In re Telecomms.*, 2003 WL 21543427, at *2, *3 ("[I]t is necessary that the plaintiffs make factual allegations

from which knowing participation may be inferred in order to survive a motion to dismiss.").

C. Plaintiff's suggestion that SunTrust aided and abetted Healthways' directors' breach of fiduciary duty by merely including the change-of-control provisions in the Credit Agreement is incorrect and unworkable.

The aiding and abetting claim made against SunTrust resembles an aiding and abetting claim made against an acquiror in an arm's-length merger transaction. In that context, this Court has used the knowing participation element to carefully craft a safe harbor for arm's length negotiations:

> Under our law, both the bidder's board and the target's board have a duty to seek the best deal terms for their own corporations when they enter a merger agreement. To allow a plaintiff to state an aiding and abetting claim against a bidder simply by making a cursory allegation that the bidder got too good a deal is fundamentally inconsistent with the market principles with which our corporate law is designed to operate in tandem.

Morgan, 2010 WL 2803746, at *8; *see also NYMEX S'holder Litig.*, 2009 WL 3206051, at *13 (dismissing aiding and abetting claim and holding that allegation that the acquiror employed "deft negotiators—seeking to 'lock-up' a transaction that, presumably, they viewed as favorable" was insufficient to state an aiding and abetting claim absent an allegation that "[the acquiror's negotiators] induced [the target's negotiators] to commit not to renegotiate the economic terms of the transaction"). Recognizing these economic realities, Delaware law thus requires

more than hard bargaining—it requires a "scheme" in which the acquiror and the target's fiduciaries are both complicitous before imposing aiding and abetting liability. *BJ's Wholesale Club*, 2013 WL 396202, at *15 ("[T]he only facts pleaded in support of that theory is that both the Buyout Group and the Board knew that BJ's was worth substantially more than $51.25 per share. Without more, those facts do not provide a reasonable inference that such a scheme existed between the Buyout Group and the Board.").

The lender/borrower relationship should be treated no differently. In a $400 million loan transaction, the bargaining agent for the bank group legally cannot self-inflict harm on the bank group (and concessions on the borrower) regarding a lender-favorable change-of-control provision. Banks are not obliged to lend money to companies, and it is the job of bank negotiators to get the most favorable credit terms it can for its bank group. Their allegiances (and their own duties) lie with the lenders, not the borrower. If the borrower accepts the provision and does not ask for concessions in exchange, the lenders' agent cannot be expected to negotiate against itself in an arm's-length transaction of this magnitude.

As a result, to the extent the borrower enters into an unfavorable credit agreement, it is not the arm's-length counterparty-lender's responsibility to propose terms more favorable to the borrower, or to ensure the borrower has adequately vetted bank-friendly credit terms with management or the board.

Rather, in this context, just like the merger context, Delaware law preserves a safe harbor for arm's-length negotiations. And with no allegation that would put SunTrust outside that safe harbor, it's alleged "conduct, again, amounts to nothing more than hard bargaining, which in an arm's-length transaction does not constitute knowing participation in a fiduciary breach." *Id.*

Accordingly, the claim against SunTrust should be dismissed with prejudice.

CONCLUSION

When parsed from the complaint, the allegations against SunTrust in support of a claim of aiding and abetting breach of fiduciary duty are bare, conclusory, and do not state a claim. For the foregoing reasons, SunTrust respectfully requests that this Court grant its motion to dismiss and enter an order dismissing the claim against SunTrust with prejudice.

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