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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

REPLY 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

Plaintiff's aiding and abetting claim against SunTrust relies on a remarkable premise. Conceding that change-of-control provisions are valid and permissible in certain circumstances, *see* Pls.' Ans. Br. at 21, Plaintiff claims that change-of-control provisions trigger a presumption of liability for borrowers and third-party lenders that ignores this Court's established "knowing participation" case law.

By contrast, the unremarkable premise of SunTrust's motion to dismiss is that in the absence of allegations that set forth a factual basis to support a claim, it must fail. And here, Plaintiff has failed to plead facts sufficient to support any reasonable inference of knowing participation. In response, Plaintiff expends considerable energy extolling the lack of virtue in change-of-control provisions in debt instruments[1] and, relying on facts outside its Complaint, imputing to SunTrust industry knowledge that change-of-control provisions are not valuable to creditors and are *per se* illegal. Plaintiff's argument lands far from the mark in addressing SunTrust's arguments and avoiding dismissal.

The disconnect of Plaintiff's logic from the law is that Plaintiff believes its claim against SunTrust should survive supported by the lone fact, without more, that SunTrust entered into a credit agreement with Healthways that contained a

[1] The agreements at issue here are a loan and credit facility backed by a bank group.

change-of-control provision. To escape dismissal, however, Plaintiff must plead facts creating a reasonable inference of ***how*** the SunTrust credit agreement did not result from arm's-length negotiation, and ***why*** SunTrust would knowingly agree to the credit agreement's change-of-control provision for the purpose of aiding and abetting the Healthways' directors' breach of their fiduciary duty to shareholders. Because the Complaint is devoid of such allegations, dismissal is appropriate.

ARGUMENT

PLAINTIFF'S RESPONSE DOES NOT ADDRESS ITS FAILURE TO ADEQUATELY PLEAD 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 order to survive a motion to dismiss." *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)). Mere allegations that a third party is involved in a challenged transaction do not survive a motion to dismiss unless the challenged transaction is deemed "inherently wrongful." *See 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). And where challenged provisions are "permissible under certain circumstances," "the fact that [a third party] requested and obtained those concessions does not, without more, give rise to an inference" of knowing participation. *Rand v. W. Airlines, Inc.*, 1989 WL 104933, at *5 (Del. Ch. Sept. 11, 1989).

Here, both cases upon which Plaintiff's claim is based acknowledge that change-of-control provisions are permissible under certain circumstances. *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). Plaintiff apparently concedes as much. *See* Pls.' Ans. Br. at 21 (acknowledging "[t]he mere possibility that a Dead Hand Proxy Put may be 'permissible in certain circumstances'"); Compl. ¶ 96 (acknowledging that these types of provisions are appropriate if the borrower obtains "economic benefits" in exchange). As a result, Plaintiff cannot rely on SunTrust merely having entered into a credit agreement with a change-of-control provision because it "does not, without more," give rise to a reasonable inference of knowing participation. *Rand*, 1989 WL 104933, at *5.

Despite the law, Plaintiff relies exclusively on its "industry knowledge" notion, imputing to SunTrust knowledge of Plaintiff's inaccurate legal premise, then relying on that imputed knowledge as the sole support for its aiding and abetting claim. The Complaint contains no allegations regarding how or why

SunTrust included the change-of-control provision in the Credit Agreement; no allegations of SunTrust's incentive to "allow" the provision if SunTrust did not believe the provision to be in its interest; and no allegation as to why SunTrust would wish to aid Healthways' directors in an alleged breach of fiduciary duty. Without further facts, the claim against SunTrust warrants dismissal.

Indeed, to refute Plaintiff's notion, one need only look further at the Delaware decisions Plaintiff claims put SunTrust on notice that change-of-control provisions in credit agreements are unlawful. In *Amylin*, the cautionary (not prohibitive) language in the decision involves bond indentures, not credit agreements. Vice Chancellor Lamb acknowledged the bank's legitimate interest in including a change-of-control provision in the credit agreement, and differentiated credit agreements from 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. Moreover, Vice Chancellor Lamb's note of caution in *Amylin* is directed to public companies, their directors, and their counsel who negotiate their debt instruments,[2] not to creditor banks who have their own stockholders and lending groups to protect. *Id.* at 319.

[2] Vice Chancellor Lamb's "concerned" language oft-cited by Plaintiff here stemmed from the Vice Chancellor's rebuke of the trustee's proffered interpretation of the indenture language. *Id*. at 314-15. Thus, the concerns raised in this decision are based on a judicially rejected debt instrument interpretation –

Likewise, *Sandridge* does not support the conclusion of any *per se* rule of aiding and abetting liability for change-of-control provisions in credit agreements. Like *Amylin*, there was no aiding and abetting claim in *Sandridge*, the analysis surrounded a bond indenture, not a credit agreement, and the court acknowledged the utility of change-of-control provisions to creditors/noteholders. *Sandridge*, 68 A.3d at 260-61. Further, the decision specifically acknowledged that the matter at issue was not the existence of the provision itself; instead, the issue in *Sandridge* on which the plaintiff and the court focused was whether the Sandridge directors had acted properly in using their discretion to approve the proposed new slate of directors. *Id.* at 247. Plaintiff refuses to acknowledge the critical distinction between a credit facility (as here) and the bond indentures in *Amylin* and *Sandridge*, a distinction that, at the very least, undercuts Plaintiff's already tenuous attempt to impute knowledge to lenders based on these decisions.

At bottom, nothing in Plaintiff's brief corrects its deficient allegation that SunTrust, solely by dint of it being a member of the lender community, was somehow on notice that the change-of-control provision in its credit agreement with Healthways was so egregious under Delaware law that its mere presence in

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hardly an edict amounting to lender industry notice that entering into credit agreements with change-of-control provisions is aiding and abetting.

the Credit Agreement constituted aiding and abetting Healthways' directors' breach of fiduciary duty.

In addition, nothing in Plaintiff's brief fills the void in the Complaint of any well-pled factual allegations to support a reasonable inference that SunTrust did anything but bargain at arm's length. Instead, Plaintiff tries subtly to shift the pleading burden, arguing that "SunTrust makes no effort to explain why it should be entitled to the presumption of arm's-length bargaining over a contract provision that is subject to enhanced scrutiny." Pls.' Ans. Br. at 24. Yet, despite virtually every M&A case invoking some form of enhanced scrutiny, whether for deal protections or a sale or change in control, aiding and abetting claims are routinely dismissed against third-party acquirors where there are insufficient facts pled to support a reasonable inference of anything other than arm's-length bargaining. *E.g.*, *Frank v. Elgamal*, 2012 WL 1096090, at *12 (Del. Ch. Mar. 30, 2012) (dismissing aiding and abetting claim in an entire fairness case because nothing in the complaint suggested that the transaction "was anything other than an arm's-length transaction").

Thus, Plaintiff's imagined burden shift does not alleviate Plaintiff from its pleading requirements to show knowing participation. Plaintiff's failure to allege facts to support an inference of anything more than arm's-length bargaining is therefore fatal to the claim against SunTrust.

CONCLUSION

The Complaint's allegation against SunTrust is simple: the bank agreed to the Credit Agreement with a change-of-control provision, so it aided and abetted the directors' breach. The legal conclusions it asks the Court to draw from that lone allegation are: (1) entering into the agreement, without more, establishes knowing participation by a lender; and (2) entering into an agreement, without more, establishes for pleading purposes that it was not negotiated at arm's-length. For the reasons set forth above and in SunTrust's opening brief, these conclusions are invalid, so Plaintiff's aiding and abetting claim must fail. 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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