IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PAUL BERGER, on behalf of himself and all similarly situated holders of BRIGHT HEALTH GROUP, INC. Plaintiff, v. KENDRICK D. ADKINS, JR., NAOMI ALLEN, LINDA GOODEN, JEFFREY R. IMMELT, MANUEL KADRE, STEVEN KRAUS, MOHAMAD MAKHZOUMI, MATTHEW G. MANDERS, G. MIKE MIKAN, ADAIR NEWHALL, ROBERT J. SHEEHY, ANDREW SLAVITT, and BRIGHT HEALTH GROUP, INC., Defendants.	)	C.A. No. 2022-0487-KSJM

ORDER GRANTING PLAINTIFF'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES

1. Bright Health Group, Inc. ("BHG" or the "Company") provides healthcare delivery, technology, financing, and distribution. BHG's twelve-person staggered board comprises Kendrick Adkins, Jr., Naomi Allen, Linda Gooden, Jeffrey R. Immelt, Manuel Kadre, Steven Kraus, Mohamad Makhzoumi, Matthew Manders, G. Mike Mikan, Adair Newhall, Robert Sheehy, and Andrew Slavitt (the "Board," and with BHG, "Defendants").

2. BHG completed an IPO in June 2021 at $18 per share. By December 2021, however, BHG's stock price was under $4 per share. The Board sought a capital infusion to improve BHG's performance. To that end, on December 6, 2021, BHG entered an Investment Agreement with Cigna Corporation and New Enterprise Associates ("NEA,"

and with Cigna, the "Counterparties").[1] Pursuant to the Investment Agreement, BHG authorized new Series A Preferred Stock. Cigna and NEA purchased 550,000 and 200,000 shares of Series A Preferred Stock, respectively. In return, BHG received a total of $750 million in cash from the Counterparties.

3. The Investment Agreement granted the Counterparties a right to convert their Series A Preferred Stock to shares of common stock at a price of $4.55 per share. The Series A Preferred Stock generally could not vote, though the shares could be voted on an as-converted basis in a change-of-control transaction. If the Counterparties converted all their respective Series A Preferred Stock, they would collectively own 48% of BHG's voting power. Combined with the Board, they would wield 55% of BHG's voting power.

4. The Investment Agreement contained standstill provisions limiting the Counterparties' ability to engage in stockholder activism for a designated period. For Cigna, the standstill period lasted for one year after executing the Investment Agreement, which expired on December 6, 2022. For NEA, the standstill period lasted two years, expiring on December 6, 2023. Three standstill provisions in the Investment Agreement are relevant to this dispute. First, Section 4.08(a)(i) prohibits the Counterparties from soliciting proxies or affirmatively "encouraging" or "advising" other BHG stockholders on Board elections or stockholder proposals.[2] Second, Section 4.08(a)(v) prohibits the Counterparties from calling any stockholder meetings, seeking representation on the

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[1] C.A. No. 2022-0487-KSJM, Docket ("Dkt.") 33 ("Barry Aff."), Ex. 1 ("Inv. Agr.").

[2] *Id.* § 4.08(a)(i).

Board, or seeking removal of any Board member.[3] Third, Section 4.08(a)(vi) prohibits the Counterparties from supporting a proposal to change BHG's Board or management.[4]

5. Plaintiff Paul Berger ("Plaintiff") is a stockholder of the Company. In January 2022, Plaintiff served a demand for inspection of BHG's books and records pursuant to 8 *Del. C.* § 220. BHG produced responsive documents. Following that production, Plaintiff filed the complaint in this action on June 3, 2022 (the "Complaint").[5]

6. In the Complaint, Plaintiff alleged that the Board breached their fiduciary duties by approving the standstill provisions. Plaintiff alleged that if the Counterparties exercised their conversion right during the standstill period, or if BHG completed a change-of-control transaction, the Counterparties and the Board would hold hard control over BHG. The standstill provisions required the Counterparties to support the Board's position, effectively stripping minority stockholders of their franchise rights. The Complaint sought to invalidate the entire Investment Agreement. Along with the Complaint, Plaintiff moved to expedite and set a trial date before Cigna's standstill period expired in December 2022.[6]

7. On August 15, 2022, the court granted Plaintiff's motion to expedite but denied the request for an earlier trial date.[7] Plaintiff failed to show a risk of irreparable harm, as there was no pending transaction allowing the Counterparties to vote on an as-

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[3] *Id.* § 4.08(a)(v).

[4] *Id.* § 4.08(a)(vi).

[5] Dkt. 1.

[6] *See id.*

[7] Dkt. 19.

converted basis and the $4.55 conversion rate was out of the money.[8] Defendants moved to dismiss on June 29, 2022.[9] The motion was fully briefed by November 3, 2022.[10]

8. Ultimately, however, BHG mooted the action by waiving its right to enforce the standstill provisions in Sections 4.08(i), 4.08(v), and 4.08(a)(vi) of the Investment Agreement. In response, Plaintiff stipulated to dismiss the action on December 13, 2022.[11] The court reserved jurisdiction to hear any subsequent request for attorneys' fees.[12]

9. Plaintiff moved for an award of attorneys' fees and expenses on January 30, 2023.[13] Plaintiff requested an "all-in" award of $2.2 million. That motion was fully briefed, and the court heard oral argument on June 9, 2023.[14]

10. In general, Delaware follows the "American Rule" and requires each party to pay its own attorneys' fees and expenses, regardless of the outcome.[15] Delaware law, however, recognizes equitable exceptions to the American Rule, including when a stockholder party produces a "corporate benefit."[16] Under this doctrine, a plaintiff is eligible to recover fees for a corporate benefit that moots a lawsuit where: "(1) the suit was

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[8] *Id.*

[9] Dkt. 7.

[10] *See* Dkts. 24, 28, 29.

[11] Dkt. 31.

[12] Dkt. 32.

[13] Dkt. 33 ("Pl.'s Opening Br.").

[14] *See* Dkt. 34 ("Defs.' Answering Br."), Dkt. 38 ("Pl.'s Reply Br."); Dkt 43 (June 9, 2024 Hr'g Tr.).

[15] *Montgomery Cellular Hldg. Co., Inc. v. Dobler*, 880 A.2d 206, 227 (Del. 2005).

[16] *EMAK Worldwide, Inc. v. Kurz*, 50 A.3d 429, 433 (Del. 2012).

meritorious when filed; (2) the action producing benefit to the corporation was taken by the defendants before a judicial resolution was achieved; and (3) the resulting corporate benefit was causally related to the lawsuit."[17] Before awarding fees, the court must decide that the plaintiff has "confer[red] a significant and substantial benefit to a class."[18]

11. Defendants do not dispute that they waived the standstill provisions before a judicial resolution or that Plaintiff's suit caused the waiver. They argue that the Complaint was not meritorious when filed and that it did not confer a substantial corporate benefit. Plaintiff bears the burden of showing both elements.[19]

12. As to the first element, a suit is deemed meritorious when filed "if it can withstand a motion to dismiss on the pleadings if, at the same time, the plaintiff possesses knowledge of provable facts which hold out some reasonable likelihood of ultimate success."[20] A claim need not have absolute assurance of success; rather, there must only be "some reasonable hope" of success.[21]

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[17] *Hollywood Firefighters' Pension Fund v. Malone*, 2021 WL 5179219, at *6 (Del. Ch. Nov. 8, 2021).

[18] *San Antonio Fire & Police Pension Fund v. Bradbury*, 2010 WL 4273171, at *7 (Del. Ch. Oct. 28, 2010).

[19] *EMAK*, 50 A.3d at 433.

[20] *Chrysler Corp. v. Dann*, 223 A.2d 384, 387 (Del. 1966).

[21] *Id.*

13. Whether Plaintiff had some reasonable hope of success depends on the standard of review. Plaintiff contends that enhanced scrutiny under *Unocal*[22] or *Blasius*[23] governs, while Defendants argue that business judgment review should apply.

14. Enhanced scrutiny is warranted under *Unocal* where a board takes defensive measures in response to a perceived threat to corporate control that are not reasonable in relation to the threat posed.[24] In *Coster v. UIP Companies, Inc.*, the Delaware Supreme Court recognized that, when a defensive measure affects the stockholder franchise, *Unocal* can be applied "with the sensitivity *Blasius* review brings to protect the fundamental interests at stake—the free exercise of the stockholder vote as an essential element of corporate democracy."[25] Following *Coster*, this decision treats *Blasius* as a context-specific variant of *Unocal*.

15. *Unocal/Blasius* calls for a two-part test. First, the court must determine whether the board faced a threat "to an important corporate interest or to the achievement of a significant corporate benefit," bearing in mind that the board's motivations must be proper and not selfish.[26] Second, the court must review whether the defensive measures were reasonable in relation to the threat: "To guard against unwarranted interference with corporate elections or stockholder votes in contests for corporate control, a board that is

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[22] *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

[23] *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988).

[24] *Kahn v. Roberts*, 679 A.2d 460, 465 (Del. 1996).

[25] *Coster v. UIP Cos., Inc.*, 2023 WL 4239581, -- A.3d --, at *11 (Del. June 28, 2023).

[26] *Id.* at *12 (quoting *Phillips v. Insituform of North America, Inc.*, 1987 WL 16285, at *7 (Del. Ch. Aug. 27, 1987)).

properly motivated and has identified a legitimate threat must tailor its response to only what is necessary to counter the threat."[27]

16. The first question is whether the Board perceived a legitimate threat. Plaintiff contends that the standstill provisions were defensive measures adopted in response to the perceived threat of an activist takeover.

17. This court recently addressed a similar set of allegations at the motion-to-dismiss stage in *In re Edgio, Inc. Stockholders Litigation*.[28] There, Edgio acquired and merged with an investor's portfolio company. Edgio paid for the acquisition in newly issued stock, which gave the investor 35% ownership of the surviving entity. The stock purchase agreement required the investor to attend all stockholder meetings and vote its shares in favor of the Edgio board's nominees. The stock purchase agreement also prohibited the investor from selling its shares to a list of known activists for a restricted period and from opposing any nonroutine corporate matters posed by Edgio's board.

18. In analyzing whether these limitations triggered *Unocal* scrutiny, the court considered both whether the measures had primarily defensive effects and whether the directors had a subjective intent to act defensively. As to the former, the court found the complaint adequately pled that the measures had primarily defensive effects: the guaranteed support of a 35% voting block made it far more likely that an incumbent would be elected, and the remaining provisions stifled opposition to the existing board's policies.

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[27] *Id.* at *12.

[28] 2023 WL 3167648 (Del. Ch. May 1, 2023).

As to the latter, the court weighed the allegations that, while the board negotiated the stock purchase agreement, the company's stock price suffered a steep decline, analysts speculated that it was an activist target, and the company lowered its guidance for the next quarter. Making plaintiff-friendly inferences, the court found it "reasonable to infer that the board negotiated for and obtained the Challenged Provisions to defend against a perceived threat of activism."[29]

19. In line with *Edgio*, here the Complaint alleged facts making it reasonably conceivable that the Board acted with subjective intent relevant to the *Unocal/Blasius* standard. The standstill provisions have objectively defensive effects, as they prevent the Counterparties from opposing the Board on elections or stockholder proposals. The Counterparties' voting power on an as-converted basis, 48%, is even higher than that of the investor in *Edgio*. Although it turned out to be economically infeasible for the Counterparties to convert their shares, conversion was still a possibility when the Board entered the Investment Agreement. Coupled with the facts that BHG's stock price had suffered a consistent decline and that BHG sought a capital infusion to try to salvage the business, the Complaint made a sufficient showing that the standstill provisions were defensive measures taken in response to a perceived threat to corporate control.

20. The second question is whether the standstill provisions were reasonable in relation to the perceived threat. A board's defensive measures "cannot deprive the

[29] *Id.* at *17. The court's ruling came with a cautionary note warning against strictly inferring subjective defensive intent from objective defensive characteristics. *See id.*

stockholders of a vote or coerce the stockholders to vote a particular way."[30] Plaintiff alleges that, if the Counterparties converted their shares or were entitled to vote in a change-of-control transaction, the standstill provisions would impermissibly "pre-ordain" the result of any vote because the Counterparties and the Board would hold a hard majority of BHG's voting power.[31] Plaintiff has adequately alleged that the standstill provisions were not reasonable in response to the general threat of a hostile takeover.

21. Accordingly, Plaintiff has adequately alleged that *Unocal/Blasius* would have applied. Under *Unocal/Blasius* enhanced scrutiny, the Complaint had a reasonable hope of success and was meritorious when filed.

22. The next question is whether Plaintiff secured a substantial benefit for BHG's stockholders. In evaluating whether a plaintiff has conferred a substantial benefit, Delaware courts are particularly cognizant of stockholders' "sacrosanct" voting rights.[32] Defendants argue that waiver of the three standstill provisions did not result "in an actual, as opposed to theoretical, benefit to stockholders."[33] Since no challenge to the Board's

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[30] *Coster*, 2023 WL 4239581, at *12.

[31] *Pell v. Kill*, 135 A.3d 764, 793 (Del. Ch. 2016) ("By pre-ordaining the results of the Annual Meeting, the Board Reduction Plan deprives stockholders of their right to vote.").

[32] *See EMAK*, 50 A.3d at 433 ("The fundamental governance right possessed by shareholders is the ability to vote for the directors the shareholder wants to oversee the firm. Without that right, a shareholder would more closely resemble a creditor than an owner."); *San Antonio Fire*, 2010 WL 4273171, at *7 ("Stockholders exercise their authority over corporate affairs by way of ballots. Accordingly, the right to vote on certain matters—most importantly the election of directors—is a fundamental power reserved to the stockholders.").

[33] Defs.' Answering Br. at 36.

control materialized, Defendants argue, the standstill provisions were harmless. But Plaintiff alleges that the mere threat of the Counterparties' voting power deterred challenges to the Board's authority. Defendants' arguments largely challenge the importance of the waived provisions; these considerations are better suited for the reasonableness of the award, which are taken up below. By eliminating provisions that threatened stockholders' voting power, Plaintiff conferred a substantial benefit. Having satisfied the requisite elements, Plaintiff is entitled to an award of attorneys' fees.

23. The next step is to analyze the reasonableness of Plaintiff's proposed $2.2 million award. Defendants argue that, to the extent that an award is appropriate, it should not exceed $300,000.[34] A trial court has broad discretion in determining the amount of attorneys' fees to award for conferring a corporate benefit. In exercising that discretion, the court looks to the *Sugarland* factors: the results achieved; the time and effort of counsel; the relative complexities of the litigation; any contingency factor; and the standing and ability of counsel involved.[35] Of the five *Sugarland* factors, the benefit conferred in the litigation is the most important.[36]

24. Plaintiff bases his $2.2 million request on precedent awards where stockholders achieved a benefit related to voting rights, but each of these cases conferred much greater benefits than Plaintiff has obtained here.

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[34] *Id.* at 50.

[35] *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1254 (Del. 2012) (citing *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149 (Del. 1980)).

[36] *Id.* at 1256.

25. In *EMAK*, the plaintiff challenged the sole preferred stockholder's attempt to seize control of a corporation by negotiating voting rights for its non-converted shares and decreasing the size of the board.[37] The plaintiff successfully defeated both changes, and this court awarded $2.5 million in fees. The Delaware Supreme Court affirmed, reiterating Vice Chancellor Laster's finding as to the benefits conferred: "This was a strong challenge brought to a transaction where there was . . . real evidence of loyalty breaches; and rescinding the transaction fundamentally changed the corporate governance landscape."[38]

26. In *San Antonio Fire*, the plaintiff stockholder challenged a board's acceptance of a continuing director provision in two credit agreements that effectively threatened the corporation's financial solvency if enough stockholder-nominated directors defeated incumbents.[39] Despite the plaintiff's proposed $5.6 million award, the court granted a $2.9 million award, reasoning that "the amount of the award should incentivize stockholders (and their attorneys) to file meritorious lawsuits and prosecute such lawsuits efficiently without generating any unnecessary windfall."[40]

27. In *In re Yahoo! Shareholders Litigation*, the plaintiff stockholder challenged a corporation's employee severance plan containing a dead-hand provision that would have prevented a new slate of directors from changing the plan.[41] By eliminating the dead-hand

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[37] 50 A.3d 429 (Del. 2012).

[38] *Id.* at 434.

[39] 2010 WL 4273171 (Del. Ch. Oct. 28, 2010).

[40] *Id.* at *12.

[41] 2009 WL 6598374 (Del. Ch. Mar. 6, 2009).

provision, the plaintiff significantly decreased the cost of selling the corporation and made it a more attractive target for potential suitors. Concluding that "the benefit bestowed upon Yahoo's shareholders was significant and sufficient to meet the first *Sugarland* factor," then-Chancellor Chandler awarded fees of $8.4 million.[42]

28. The benefit obtained by Plaintiff here is far narrower in scope and duration than that in *EMAK*, *San Antonio Fire*, and *Yahoo!*. Although the Complaint sought to invalidate the entire Investment Agreement, Plaintiff only achieved waiver of three standstill terms. BHG did not waive the remaining standstill protections in Section 4.08. The waived terms only had a meaningful effect if both Cigna and NEA opted to convert their shares, an option that was never economically feasible. And perhaps most damning, unlike in the three cases Plaintiff cites, the benefit was not indefinite. Under the Board's staggered terms, only three directors were up for election in 2022, the year that both Counterparties' standstill provisions were active. By the time Plaintiff obtained the waiver, Cigna (who held the lion's share of the Series A Preferred Stock) was no longer subject to the standstill provisions. NEA's restricted period had less than a year remaining.

29. Two cases cited by Defendants, *Full Value Partners, L.P. v. Swiss Helvetia Fund, Inc.*[43] and *Oklahoma Firefighters Pension & Retirement System v. Davis*,[44] provide more comparable precedential benchmarks.

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[42] *Id.* at *1.

[43] 2018 WL 27448261 (Del. Ch. June 7, 2018).

[44] C.A. No. 9271-VCN, Dkt. 3 ("*Davis* Order").

30. In *Full Value Partners*, a plaintiff stockholder alleged that members of a corporation's board inequitably applied a bylaw requiring director candidates to meet a list of industry-specific qualifications.[45] Although the board had never publicized information about its own nominees' qualifications, the board threatened to disallow stockholder-selected nominees from election based on their inability to satisfy the bylaw. After the plaintiff filed suit, the corporation agreed that it would count votes for all of plaintiff's nominees in the election. The plaintiff's nominees won two out of the three contested board seats. Though the board initially refused to seat one of these directors pursuant to the qualifications bylaw, the board agreed to seat the director a month later and amended its bylaws to eliminate the provision. This court recognized the plaintiff as having obtained a substantial corporate benefit and awarded $300,000 in fees, reasoning that the benefits were "valuable . . . although the value is difficult to quantify."[46]

31. In *Davis*, the plaintiff stockholder alleged violations of the DGCL and breaches of fiduciary duties in connection with the board's bylaw amendment, which required approval of 80% of the corporation's outstanding shares to effectuate any stockholder-adopted bylaw amendment.[47] After the stockholder sued, the board amended the bylaws to remove the 80% requirement. Recognizing the corporate benefit of vindicating the stockholder franchise, this court approved a fee award of $400,000.[48]

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[45] *Full Value P'rs*, 2018 WL 27448261, at *3.

[46] *Id.* at *8.

[47] *Davis* Order at 2.

[48] *Id.* ¶ 6.

32. Based on *Full Value Partners* and *Davis*, Plaintiff obtained a substantial corporate benefit in this action that justifies an award of $400,000. Plaintiff vindicated the BHG stockholders' franchise by eliminating the standstill provisions, though those provisions were limited in scope and duration.

33. Under the second *Sugarland* factor, this court often looks to the lodestar as a cross-check on the award amount. Plaintiff represents that its expenses, including costs, totaled $396,770.99.[49] An award near Plaintiff's actual expenses seems appropriate in this case to compensate for the corporate benefit achieved without conferring a windfall.

34. The remaining *Sugarland* factors also support this award. Plaintiff's counsel is well-regarded in this court, and they took on the representation on a contingent basis. The award also remunerates counsel's efforts to fully brief Defendants' motion to dismiss before the parties reached a settlement.

35. The corporate benefit doctrine entitles Plaintiff's counsel to a fee award of $400,000. The parties shall submit an implementing form of order within 10 business days.

IT IS SO ORDERED.

/s/ Kathaleen St. J. McCormick
Chancellor Kathaleen St. J. McCormick
Dated: August 8, 2023

[49] Pl.'s Opening Br. at 41; *see also* Barry Aff.