EFiled: Oct 02 2014 06:37PM EDT
Transaction ID 56125127
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 FURTHER SUPPORT OF HEALTHWAYS, INC. AND INDIVIDUAL DEFENDANTS' MOTION TO DISMISS

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STATUTE

The Individual Defendants and Nominal Defendant Healthways, Inc. ("Defendants") respectfully submit this Reply Brief in further support of their Motion to Dismiss Pontiac's Verified Class Action and Derivative Complaint.[1]

PRELIMINARY STATEMENT

Plaintiff's Combined Answering Brief in Opposition to Defendants' Motions to Dismiss (the "Answering Brief") makes clear that Pontiac is not merely asking the Court to follow *Amylin* or *SandRidge.* Rather, Pontiac is asking this Court to do what Vice Chancellor Lamb, then-Chancellor Strine and the Supreme Court of Delaware declined to do in those cases – namely, to declare that entering into any agreement that contains a proxy put is a *per se* breach of fiduciary duty. In fact, that is the only thing Pontiac could be seeking when an election of directors is ***nine months away*** and stockholders are not presently considering the nomination of candidates.

Issuing the type of declaratory judgment that Pontiac seeks is particularly inappropriate here because there is no ripe claim, and nothing in Pontiac's Answering Brief establishes otherwise. Delaware courts simply do not issue the sort of advisory rulings that Pontiac seeks in this case, and with good reason. After all, "to announce a sweeping legal rule" when "the court cannot be expected to

[1] All naming conventions in Defendants' Opening Brief have been adopted in this Reply Brief.

guess whether or how the dispute in this case might eventually crystalize" would be "a grave error." *Bebchuk v. CA, Inc.*, 902 A.2d 737, 744 (Del. Ch. 2006).

As set forth in the Opening Brief, ripeness "goes to the very heart of whether a court has subject matter jurisdiction" and requires static material facts that, at the very least, are highly unlikely to be affected by "uncertain and contingent events." (Opening Brief. p. 11). None of those requirements are met in this case. Indeed, the Healthways Board has not invoked the CIC Provision contained in the 2012 Loan Agreement, and no actual or threatened proxy contest for director positions is either ongoing or imminent.

Thus, Pontiac spends much of its Answering Brief trying to convince this Court that a "present harm" results from the alleged "ongoing deterrent effect" of the CIC Provision. Tellingly, however, Pontiac cannot point to who is deterred from doing what in the coming months because of the mere presence of that provision. Rather, to try and establish an injury-in-fact, "plaintiff relies on … conjure[d] up hypothetical situations in which the challenged provision[] ***may*** be applied[.]" *Wayne Cnty. Emps. Ret. Sys. v. Corti*, 2009 WL 2219260, at *19 (Del. Ch. July 24, 2009) (emphasis in original).

Given this problem, Pontiac tries to liken this case to poison pill cases finding a "present harm" even in the absence of a specific takeover threat. Pontiac also points to at least one case involving a challenge to corporate bylaws. These

cases, however, are inapplicable given that they involved immediate harms that either did not depend on "uncertain or contingent events" or presented some other "compelling justification to rule in advance[.]" *Bebchuk*, 902 A.2d at 741.

In this case, it is entirely uncertain whether the facts needed to hear Pontiac's claims will unfold over the next nine months. Accordingly, "the common sense assessment of whether the interests of the party seeking immediate relief outweigh the concerns of the court in postponing review until the question arises in some more concrete and final form" is clear and effectively mandates dismissal until an actual and live controversy can be brought before this Court. *XL Specialty Ins. Co. v. WMI Liquidating Trust*, 93 A.3d 1208, 1217-18 (Del. 2014) ("[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.'") (internal citations omitted).

ARGUMENT

I. PONTIAC'S REQUEST FOR A DECLARATORY JUDGMENT AT THIS TIME SEEKS AN IMPROPER ADVISORY OPINION.

Pontiac seeks declaratory judgment "that the Individual Defendants breached their fiduciary duties ***by approving the Company's entry into the Loan Agreement*** that contains a Dead Hand Proxy Put[.]" (Compl. at 37 (Prayer for Relief)) (emphasis added). Pontiac packages this extraordinary request as the natural corollary to *Amylin* and *SandRidge*, but it is not. Rather, Pontiac's request would have this Court go far beyond either of those prior proxy put cases, which dealt with the active use of proxy puts by incumbent corporate directors to entrench their positions. Pontiac would now have this Court rule on the ***very existence*** of proxy puts and establish a rule that entry into an agreement containing a proxy put is a *per se* breach of fiduciary duty – an extraordinary step that Vice Chancellor Lamb, then-Chancellor Strine, and the Delaware Supreme Court all declined to take even when presented with circumstances that were far more extreme than anything alleged in this case.[2]

[2] In *Amylin* and *SandRidge*, the respective board of directors ***affirmatively invoked*** and actively attempted to exploit a change in control provision for the ***express purpose*** of thwarting stockholders' efforts to effectuate a change in leadership. Indeed, in both cases, the boards engaged in this effort ***in the midst of a proxy contest***. *See San Antonio Fire & Police Pension Fund v. Amylin Pharms., Inc.*, 983 A.2d 304, 309-10 (Del. Ch. 2009); *Kallick v. SandRidge Energy, Inc.*, 68 A.3d 242, 244-45 (Del. Ch. 2013).

As set forth in Healthways' Opening Brief, ripeness requires static material facts that do not hinge on "uncertain and contingent events" or pose a risk that "future events" will obviate the need for judicial intervention. (Opening Brief. p. 11). And, despite any claim by Pontiac to the contrary, this same standard for ripeness applies with equal force in declaratory judgment actions. "Even if a controversy appears inevitable, a party seeking declaratory relief must still show that there is a substantial controversy of sufficient ***immediacy*** and ***reality*** to warrant the issuance of a declaratory judgment." *In re Ebix, Inc. S'holder Litig.*, 2014 WL 3696655, at *12 (Del. Ch. July 24, 2014) (emphasis added) (internal citation omitted); s*ee also XL Specialty*, 93 A.3d at 1216 (a trial court may not entertain a declaratory judgment action "unless the action presents an actual controversy"); *Stroud v. Milliken Enters. Inc.*, 552 A.2d 476, 479 (Del. 1989) (declaratory judgment actions must meet the "prerequisites of an actual controversy" including ripeness: "the existence of a controversy is not determinative. Unless a controversy is ripe for judicial determination, a court may simply be asked to render an advisory opinion"); *Siegman v. Tri-Star Pictures, Inc.*, 1989 WL 48746, at *4 (Del. Ch. May 5, 1989) ("A critical requirement to properly invoke declaratory judgment jurisdiction is that 'the issue … be ripe for judicial determination.'") (quoting *Stroud*, 552 A.2d at 479).

Pontiac has not alleged a ripe controversy of sufficient reality or immediacy, but is asking this Court to undertake the risky exercise of ruling on an important legal issue while the facts necessary for a clear determination undeniably remain in flux and will continue to remain in flux until sometime in mid-2015. Even then, it is completely uncertain whether Pontiac's claims will become ripe for all of the reasons set out in Defendants' Opening Brief. It is very difficult to justify the potential waste of scarce judicial resources on an immediate decision that may very well prove unnecessary, which is why the Supreme Court of Delaware has consistently warned, "[w]henever a court examines a matter where facts are not fully developed, it runs the risk not only of granting an incorrect judgment, but also of taking an inappropriate or premature step in the development of the law." *Stroud*, 552 A.2d at 480. This warning has particular resonance in this case, where Pontiac is asking the Court essentially to take up a significant legal issue of first impression. "The significance of these legal issues requires this Court to demand that the dispute between the parties be close to a 'concrete and final form.' To require anything less is but an invitation for a court to render an ***advisory opinion*** based on a hypothetical case, and the definition of rights which are 'only future and contingent.'" *Id*. at 481 (emphasis added and internal citation omitted).

II. PONTIAC HAS NOT ALLEGED A TRUE "PRESENT HARM."

In clear recognition of the obstacle presented by the foregoing authority, Pontiac tries to manufacture ripeness. As support for this effort, Pontiac heavily relies on a single sentence in Vice Chancellor Noble's decision in *Amylin II* in which he stated: "***They deter*** the stockholders from nominating and electing directors of their choosing to Amylin's board." (Answering Brief p. 2); *San Antonio Fire & Police Pension Fund v. Amylin Pharms., Inc.*, 2010 WL 4273171 (Del. Ch. July 1, 2010) ("*Amylin II*").[3] According to Pontiac, this statement confirms that stockholders are "presently harmed" by the "ongoing deterrent effect" of proxy put provisions like the CIC Provision contained in Healthways' 2012 Loan Agreement. (Answering Brief p. 4). Pontiac's reliance on *Amylin II* for this purpose is misplaced.

Indeed, in considering Vice Chancellor Noble's statement from *Amylin II*, it is important to bear in mind that Vice Chancellor Lamb had already ruled in *Amylin* that claims relating to future elections of directors ***were not ripe*** and, thus, had no "ongoing deterrent effect." The *Amylin II* decision makes this unmistakably clear: "Count III seeking declaratory relief as to the continuing director provision in the Indenture … ***[was] deemed unripe*** for adjudication and

[3] While Pontiac admits this quote is an explanation of "the similarities and the distinction between the two types of proxy puts in *Amylin II*[,]" it later attempts to broaden that language to all proxy puts. (*Compare* Answering Brief at 2, 4 *and* 18-19).

dismissed without prejudice." 2010 WL 4273171, at *5 (emphasis added). Pontiac concedes that *Amylin* ruled that a challenge to a proxy put based on a future election of directors was not ripe. (Answering Brief p. 19). Pontiac just asks that this Court disregard Vice Chancellor Lamb's holding on that point as "not supported by any authority." *Id.*

There is no basis for this Court to do so. Vice Chancellor Lamb's ruling in *Amylin I* squarely rejected the notion that a proxy put ***always*** implicates stockholder rights, holding instead that a proxy put is a contract term that "***may, in some circumstances*** impinge on the free exercise of the stockholder franchise" or "***may*** affect the stockholders' range of discretion." *Amylin*, 983 A.2d at 319. Until the relevant "circumstances" are known and show an actual adverse effect on stockholder action, Pontiac's claim is unripe and "the risk of prejudice … of an improvident decision made in a factual vacuum, at a time when there is no urgent need for decision, outweighs the potential costs of future litigation." *Id.* at 318. In such circumstances, the case law is clear that a plaintiff should be required to replead its case once the "relevant facts [are] frozen." *Id.*

Importantly, the Supreme Court of Delaware took Vice Chancellor Lamb's ruling one step further and refused to acknowledge any harm in a dormant proxy put by ruling that the decision to enter into an agreement with a proxy put did not

breach directors' fiduciary duties if that decision did not involve a "reasonably foreseeable material risk to the … stockholders" at the time the decision was made:

> The Court of Chancery determined, *inter alia*, that Amylin Pharmaceuticals' board of directors ***did not breach its duty of care in authorizing the corporation to enter into the Indenture Agreement, with its 'proxy put' provision.*** That determination was correct, not only for the reasons made explicit in the Court's opinion, but also for one that is implicit: ***no showing was made that approving the 'proxy put' at that point in time would involve any reasonably foreseeable material risk to the corporation or its stockholders***. That risk materialized only months later….

San Antonio Fire & Police Pension Fund v. Amylin Pharms., Inc., 981 A.2d 1173, 1173 n.2 (Del. 2009) (Table) (emphasis added). Clearly, the mere existence of a dormant proxy put did not concern Justice Jacobs (who authored the decision). Like the Amylin board, the Healthways Board – which will remain classified until 2016 – had no reason to think that the mere existence of a proxy put necessarily constituted a "present harm" to its stockholders.

Finally, in stark contrast to *Amylin* and *SandRidge*, an "ongoing deterrent effect" cannot be established here. North Tide has very recently proven that, as a practical matter, Healthways' stockholders are not deterred in any way from presenting, nominating or electing director candidates who do not originate with the Board. As explained in Defendants' Opening Brief, earlier this year, North Tide initiated a proxy contest that resulted in the addition of three stockholder-proposed directors to the Healthways Board. The Board never even made

reference to the CIC Provision during this process. And, given that the Healthways Board continues to be composed of a supermajority of "Continuing Directors," there can be no argument that the CIC Provision has any relevance today.

III. PONTIAC'S POISON PILL AND BYLAWS CASES ARE INAPPLICABLE AND DO NOT SUPPORT ITS POSITION.

Knowing that the *Amylin* and *SandRidge* decisions do not support its claims regarding ripeness and standing, Pontiac tries to compare this case to several poison pill and bylaws cases wherein claims were deemed ripe even when the corporate provision at issue had not been triggered. According to Pontiac, these cases are "virtually identical" to the circumstances of this case. (Answering Brief p. 15). This statement simply does not stand up to scrutiny. In fact, unlike this case, all of the poison pill and bylaws decisions on which Pontiac relies are clearly inapplicable because they involved immediate harms that either did not depend on "uncertain or contingent events" or presented some other "compelling justification to rule in advance" that is not present here. *XL Specialty*, 93 A.3d at 1217-18; *Bebchuk*, 902 A.2d at 741.

For example, Pontiac cites to the Court of Chancery decision in *Moran v. Household International, Inc.*, 490 A.2d 1059 (Del. Ch. 1985), for the proposition that the "deterrent features" of poison pill provisions "presently affect[]

shareholders' fundamental rights[.]" (Answering Brief p. 15).[4] The subsequent history of that case, however, undermines any such claim. Indeed, after ruling that the defendant-directors in *Moran* were entitled to the benefit of the business judgment rule in evaluating their adoption of the poison pill, the Supreme Court of Delaware stated: "We reject [plaintiffs'] contention that the Rights Plan [presently] strips stockholders of their rights to receive tender offers, and that the Rights Plan fundamentally restricts proxy contests. . . ." *Moran v. Household, Int'l. Inc.*, 500 A.2d 1346, 1357 (Del. 1985). Thus, the Supreme Court made clear that the mere adoption of the poison pill – while having latent defensive value – presented no ongoing harm to the stockholders. In *Moran*, the Supreme Court also made clear that, with respect to any alleged future harms, the correct course was to reserve judgment: "The ultimate response to an actual takeover bid must be judged by the directors' action ***at that time***.… Their use of the Plan will be evaluated ***when and if the issue arises***." *Id.* This reasoning applies with equal force in this case.

Pontiac next relies on *Carmody v. Toll Brothers, Inc.*, 723 A.2d 1180 (Del. Ch. 1998) for the proposition that the mere existence of a dead hand poison pill states a ripe claim, even in the absence of a specific hostile takeover proposal.

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[4] *See* Answering Brief p.15 ("In the leading case of *Moran*... a stockholder challenge to the validity of a poison pill was held to be ripe 'because [] its deterrent features presently affect[] shareholders' fundamental rights[.]'") (quoting the Court's characterization of plaintiff's position in *Moran v. Household International, Inc.*, 490 A.2d 1059, 1072 (Del. Ch. 1985)).

(Answering Brief pp. 16-17). While that accurately conveys the holding in *Carmody,* there were specific and unique harms to the stockholders in *Carmody* that are not presented by the CIC Provision at issue here. In *Carmody,* the Court faced for the first time a challenge to the adoption of a poison pill coupled with a dead hand provision. The claim was deemed ripe on two grounds that simply do not apply here:

> (i) the case involved a "facially invalid rights plan" that violated the Delaware General Corporation Law by stripping portions of the Board of its full authority pursuant to 8 *Del. C. §* 141; and
>
> (ii) because the poison pill provision was uniquely structured to prevent redemption by non-incumbent directors, it sent an immediate signal to the external market / potential acquirors ***that the Company could not be acquired*** without suffering massive dilution[5] and, thus, denied stockholders of their "***present entitlement*** to receive and consider takeover proposals."

Id. at 1188 (emphasis in original). Here, as demonstrated by North Tide, the Healthways stockholders have not experienced lost opportunities to press for changes to the Healthways Board. Nor is the 2012 Loan Agreement "facially invalid" or otherwise inconsistent with the DGCL: Consistent with 8 *Del. C.* § 141, all directors, including stockholder-proposed directors, will maintain full authority to run the Company.

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[5] *See Carmody*, 732 A.2d at 1186 (describing the contemporaneous "takeover strategy: a tender offer coupled with a solicitation for shareholder proxies to remove and replace the incumbent board with the acquiror's nominees who, upon assuming office, would redeem the pill").

Pontiac's other poison pill cases fare no better in establishing the ripeness of its claim. In *Leonard Loventhal Account v. Hilton Hotels Corp.*, 2000 WL 1528909 (Del. Ch. Oct. 10, 2000), the Court of Chancery did take up a challenge to a dormant poison pill provision. The Court of Chancery made clear however, that its decision to do so was prompted by the fact that the poison pill provision at issue ***completely eliminated director liability*** with respect to any "actions, calculations, interpretations and determinations" concerning the pill. *Id.* at *10. According to the Court, the plaintiff stated a ripe claim because it was challenging a provision that undeniably violated the DGCL on its face and, thus, involved the sort of compelling justification to rule on policy required by *Stroud*.[6] *See id.* at *11. Here, there is neither a facially invalid provision nor a fundamental policy concern that requires ruling in advance of a ripe claim.

Likewise, in *KLM Royal Dutch Airlines v. Checci*, 698 A.2d 380 (Del. Ch. 1997), stockholder KLM had both the option to purchase shares of the company's common stock during a 30-day window and a contractual obligation to purchase stock at a later time if it declined to exercise that option. If KLM were to exercise

[6] *See Stroud*, 552 A.2d at 480 (weighing the many reasons "for not rendering a hypothetical opinion" against "the benefits to be derived from the rendering of a declaratory judgment… including an identification of the legal questions in the case."); *see also Bebchuk*, 902 A.2d at 743 (holding that ruling on the facial validity of a bylaw before it was adopted was improper as "there is no compelling justification to rule in advance").

its option, it would exceed the company's poison pill trigger and substantially dilute its own investment; if it declined to exercise its option, it would be forced to exceed the company's poison pill trigger and substantially dilute its own investment. KLM sought declaratory judgment rescinding the rights plan because it presently violated the terms of the option agreement and immediately depressed the value of its holdings. The Court deemed this a "present injurious effect" and found "a strong likelihood of future harm if it cannot now obtain a declaration concerning the application of the rights plan to the exercise of its option." *KLM*, 698 A.2d at 383. No similar injuries have been alleged by Pontiac. Indeed, as discussed at length in the Opening Brief at 12-18, it is very likely that the CIC Provision at issue here will ***never*** be triggered under even some imagined "worst case" scenario given "the relative ease with which consents or waivers are obtained in bank lending[.]"[7] *Amylin I*, 983 A.2d at 315 n.30.

Pontiac's reliance on *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 946 (Del. Ch. 2013), which only addressed "the facial statutory and

[7] Again, any ruling to the contrary would be a departure from *Amylin I* and *SandRidge*, which both declined to find proxy puts improper *per se* and specifically held that boards may negotiate the parameters of those provisions. Indeed, the *Chevron* case warns that it would "chill corporate freedom" to deem impermissible a provision of a corporate instrument "that is consistent with the board's statutory and contractual authority, simply because it might be possible to imagine situations when [it] might operate unreasonably." *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 949, n.62 (Del. Ch. 2013).

contractual validity of [forum selection] bylaws," is equally unavailing. *Id.* at 948. In ruling on the facial challenge alone, then-Chancellor Strine made clear that it would be improper to premise any ruling on ***potential misuses*** of the bylaws, which could be considered by the Court only once those "real human events" unfold:

> [T]he plaintiffs have conjured up an array of ***purely hypothetical situations*** in which they say that the bylaws of Chevron and FedEx might operate unreasonably. As the court explains, ***it would be imprudent and inappropriate to address these hypotheticals in the absence of a genuine controversy with concrete facts***. Delaware courts typically decline to decide issues that may not have to be decided or that create hypothetical harm.
>
> * * *
>
> The plaintiffs try to show that the forum selection bylaws are inconsistent with the law and thus facially invalid by expending much effort on ***conjuring up hypothetical as-applied challenges*** in which a literal application of the bylaws might be unreasonable. For reasons this court has explained, these hypotheticals are not appropriately posed. … Under our law, ***our courts do not render advisory opinions about hypothetical situations that may not occur.*** Rather, as in other contexts, the time for a plaintiff to make an as-applied challenge [is when] a court will have a concrete factual situation."

Id. at 940, 958-59 (internal quotation omitted) (emphasis added); *see also Openwave Sys. v. Harbinger Capital Partners Master Fund I, Ltd.*, 924 A.2d 228, 240 (Del. Ch. 2007) ("Delaware law does not permit challenges to bylaws based on ***hypothetical abuses***.") (emphasis added).

In *Chevron*, Chancellor Strine also made clear that the facial challenge to the bylaws was ripe ***only*** because the plaintiff had to "show that the bylaws cannot

operate lawfully or equitably ***under any circumstances***" immediately or in the future. *Id.* at 949 (emphasis in original). In other words, the plaintiff's challenge did not depend in any way on "uncertain or contingent events that may not occur." *XL Specialty Ins. Co.*, 93 A.3d at 1217-18. Again, for all the reasons discussed, Pontiac can make no similar claim in this case.[8]

IV. THE DECISION IN *WAYNE COUNTY EMPLOYEES RETIREMENT SYSTEM* IS INSTRUCTIVE AND COUNSELS IN FAVOR OF DISMISSAL.

If any comparison should be drawn between this case and decisions addressing other corporate provisions, Defendants submit that this Court should look to *Wayne County Employees Retirement System v. Corti*, 2009 WL 2219260 (Del. Ch. July 24, 2009), which involved a challenge to the existence of two certificate provisions.

In *Wayne County*, a stockholder filed suit alleging that dormant certificate provisions could be used to harm stockholders and, therefore, must be declared invalid. The certificate provisions shielded certain directors from liability and any breaches of fiduciary duty associated with their personal pursuit of corporate opportunities with an affiliate. The defendants argued that challenges to the

[8] For example, Pontiac readily concedes – as it must – that any declaration of "default" under the 2012 Loan Agreement would be at the ***discretion*** of the banks. *See* Compl. at ¶ 40 ("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*** … declare a default") (emphasis added).

certificate provisions were not ripe "because plaintiff is not challenging the use of, or any action taken under, these provisions, but instead relies on arguments that are 'hypothetical, speculative and based upon no concrete situation giving rise to a justifiable attack on the provisions.'" *Id.* at *16.

The Court of Chancery "agree[d] with defendants . . . that the mere existence of the provisions does not threaten harm sufficient to warrant a declaratory judgment on their facial validity" and "[a]t this juncture … the court need not decide the issue because there is no present effort to enforce the provision in a manner to preclude or waive liability for [the defendant] directors." *Id.* at *18. In ruling that the claim was not ripe, the Court held that "an action is not ripe for adjudication when it is 'contingent,' meaning 'the action requires the occurrence of some future event before the action's factual predicate is complete.'" *Id.* at *16 (quoting *Energy Partners, Ltd. v. Stone Energy Corp.*, 2006 WL 2947483, at *7 (Del. Ch. Oct. 11, 2006)).

Chancellor Chandler acknowledged that "Courts have always refused to make a speculative inquiry upon a hypothetical basis which may never come to pass":

> [P]laintiff relies on the possibility that some future action may be taken under Sections 8.3 and 9.3 that will harm plaintiff and be contrary to Delaware law. ***Such a possibility, however, is too remote and speculative to justify rendering a declaratory judgment, and plaintiff is not entitled to a declaratory judgment merely because it is able to conjure up hypothetical situations in which the challenged***

> ***provisions* may *be applied contrary to Delaware law.*** Here, in light of the nature of the challenges to the two provisions, I am not convinced that the potential benefit of a declaratory judgment outweighs the valid concerns associated with rendering a hypothetical opinion. Accordingly, I am convinced that plaintiff's challenges to Sections 8.3 and 9.3 of [the defendant's] certificate are not ripe for adjudication.

Id. at *16 n.92, 92 (emphasis added).

Like the stockholder in *Wayne County*, Pontiac is urging the Court to issue a declaration on the basis of what ***might*** happen in the ***future***. But, as this Court has consistently acknowledged in the past, such a declaration is especially unwarranted and inadvisable when "uncertain and contingent events" are likely to obviate the need for any such declaration entirely. Rather, as the foregoing authority makes clear, the Court should exercise jurisdiction ***only*** if litigation is unavoidable ***and*** "the material facts are static." *Bebchuk*, 902 A.2d at 740.

CONCLUSION

For the foregoing reasons, as well as those set out in Defendants' Opening Brief, Pontiac's Verified Class Action and Derivative Complaint should be dismissed in its entirety as unripe and for lack of standing.

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October 2, 2014