IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ENERGY PARTNERS, LTD., a Delaware corporation, Plaintiff, v. STONE ENERGY CORPORATION, a Delaware corporation, Defendant.	)	Civil Action No. 2402-N
ATS, INC., a Delaware corporation, Plaintiff, v. RICHARD A. BACHMANN, JOHN C. BUMGARNER, JR., JERRY D. CARLISLE, HAROLD D. CARTER, ENOCH L. DAWKINS, NORMAN C. FRANCIS, ROBERT D. GERSHEN, PHILLIP A. GOBE, WILIAM R. HERRIN, JR., WILLIAM O. HILTZ, JOHN G. PHILLIPS, ENERGY PARTNERS, LTD., a Delaware corporation, and STONE ENERGY CORPORATION, a Delaware corporation, Defendants.	)	Civil Action No. 2374-N

MEMORANDUM OPINION

Submitted: September 22, 2006
Decided: October 11, 2006

REVISED COVER PAGE

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PARSONS, Vice Chancellor.

This matter is before the Court on two separate, but related Civil Actions, Nos. 2374-N and 2402-N, seeking declaratory judgment relief as to the meaning and validity of a provision of a merger agreement (Section 6.2(e)) between two oil and gas exploration companies, Energy Partners, Ltd. ("EPL") and Stone Energy Corporation ("Stone"). Stone, the target of the merger, is a defendant in both actions; EPL is the plaintiff in No. 2402. The plaintiff in the second action, ATS, Inc. ("ATS"), is another oil and gas company that made an unsolicited tender offer for EPL after EPL and Stone agreed to merge, but contingent on the merger not going forward ("ATS Tender Offer"). The tender offer commenced on August 31, 2006, and was set to expire on September 28, 2006. EPL and ATS (collectively, the "Plaintiffs") claim that under Stone's construction of Section 6.2(e), EPL would be precluded from engaging in numerous strategic activities, including communicating with ATS about its tender offer, that EPL must be able to pursue to satisfy its fiduciary and statutory duties to its stockholders. Plaintiffs therefore contest Stone's reading of Section 6.2(e) and, alternatively, claim it is invalid on its face because it impermissibly circumscribes the EPL directors' ability to perform their fiduciary duties. Stone denies Plaintiffs' allegations and has moved to dismiss their claims on the grounds that there is no actual controversy and the claims are not ripe.

The Court conducted an expedited trial on the Section 6.2(e) issues on September 22, 2006. The parties submitted the case on an agreed record and presented argument on the merits and on Stone's motion to dismiss at that time. Due to exigent circumstances, including the pendency of the ATS Tender Offer and the contemplated stockholders' vote on the Stone Merger Agreement, the Court set forth its determinations

in a summary manner in an oral ruling on September 27, 2006 to provide clarity to the parties going forward. Those determinations are explicated in this memorandum opinion.

For the reasons stated, the Court concludes that Plaintiffs' claims are justiciable, but only to the extent they relate to EPL's ability to explore Third Party Acquisition Proposals as defined in the Stone Merger Agreement, including the ATS Tender Offer. In all other respects, the claims are dismissed without prejudice as premature. Regarding consideration of or negotiation as to Third Party Acquisition Proposals, the Court holds that such activity is outside the scope of the proscriptions of Section 6.2(e). Accordingly, Plaintiffs' contention that Section 6.2(e) is invalid on its face because it restricts such activity is moot.

I. BACKGROUND

A. The Parties

Plaintiffs are Energy Partners, Ltd., a Delaware corporation with its principal place of business in New Orleans, Louisiana, and ATS, Inc., a Delaware corporation, and an indirect wholly owned subsidiary of Woodside Petroleum Ltd. ("Woodside"), a listed Australian Company.[1] EPL is an independent oil and natural gas exploration and production company with current operations in the Gulf of Mexico.[2] ATS's parent, Woodside, is also an oil and gas exploration and production company with operations in eleven countries.[3] Defendant is Stone Energy Corporation, a Delaware corporation with

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1 Joint Pretrial Order at 3.

2 *Id*. at 2-3.

3 *Id*. at 2.

its principal place of business in Lafayette, Louisiana.[4] Stone is also an independent oil and gas production company with operations located primarily in the Gulf of Mexico and the Rocky Mountain region.[5]

B. Factual Background

These cases involve a series of proposed corporate acquisitions. The first occurred on April 23, 2006, when the Stone Board of Directors approved a merger agreement with Plains Exploration and Production Company ("Plains") under which Stone would merge into a wholly owned subsidiary of Plains.[6] The merger agreement ("Plains Merger Agreement") contained a "no-shop" provision applicable to Stone (but not to Plains)[7] and a "fiduciary out" provision that permitted Stone, after consultation with its legal and financial advisors, to investigate other unsolicited proposals that qualified as superior to the Plains transaction.[8] In the event of termination due to a superior proposal, Stone agreed to pay Plains a termination fee of $43.5 million.[9]

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4 *Id*. at 2.

5 *Id*. There are a number of additional defendants in No. 2374, but they are not involved in the declaratory judgment claims as to Section 6.2(e) currently before the Court.

6 *Id.* at 3.

7 *Id*.

8 JX 14 at 63.

9 According to EPL, the Plains transaction had an aggregate equity value of approximately $1.46 billion based on the closing price of Plains common stock on April 21, 2006. EPL's Mot. to Dismiss at 2.

A month later, on May 25, 2006, EPL offered to acquire Stone for $52.00 in cash or EPL stock, subject to certain restrictions.[10] Upon receipt of this proposal, the Stone board determined that the proposal met the requisite fiduciary out provision in the Plains Merger Agreement and initiated negotiations with EPL.[11] The negotiations lasted three weeks.[12]

On June 15, 2006, EPL submitted the final version of its merger agreement to Stone.[13] In broad terms, the agreement provided that Stone would merge with a wholly owned subsidiary of EPL, and Stone stockholders would receive $51.00 in cash or in EPL stock based on its 20-day average trading price, subject to a collar on the exchange ratio and ceilings on the amounts of stock and cash.[14] The Stone board approved the execution of the EPL merger and the related termination of the Plains Merger Agreement on June 22, 2006 ("Stone Merger").[15] Pursuant to the Plains Merger Agreement termination clause, and as part of their merger agreement with Stone ("Stone Merger Agreement"), EPL agreed to pay the $43.5 million termination fee on behalf of Stone to Plains.[16]

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10 Joint Pretrial Order at 3.

11 EPL Opening Brief ("EOB") at 4; Stone Answering Brief ("SAB") at 7.

12 Joint Pretrial Order at 3-4.

13 *Id*.

14 *Id*.

15 *Id*. at 4; JX 14 Stone Merger Agreement ("SMA") § 4.27.

16 *Farrington v. Bachmann*, C.A. No. 2416-N, Am. Class Action Compl. ¶ 26.

C. The Stone Merger Agreement

In negotiating the Stone Merger Agreement, EPL and Stone used the Plains Merger Agreement as a model.[17] Relevant here, Section 6.2(e), the provision for which EPL and ATS seek a declaratory judgment, remained the same as in the Plains Merger Agreement.[18] Section 6.2(e), entitled "Conduct of Business by Parent [EPL] Pending the Merger," provides:

> Except as expressly permitted or required by this Agreement, prior to the Effective Time, neither Parent nor any of its Subsidiaries, without the prior written consent of Target, shall:
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> (e) knowingly take, or agree to commit to take, any action that would or would reasonably be expected to result in the failure of a condition set forth in Sections 8.1, 8.2, or 8.3 [conditions to consummation of the merger] or (b) at, or as of any time prior to, the Effective Time, or that would reasonably be expected to materially impair the ability of Target, Parent, Merger Sub, or the holders of Target Common Shares to consummate the Merger in accordance with the terms hereof or materially delay such consummation . . . .[19]

In addition, the Stone Merger Agreement does not have an express "no-shop" provision restricting EPL's actions, but does contain a no-shop provision constraining actions by Stone.[20] The Stone Merger Agreement also provides that Stone, but not EPL, may terminate the merger if EPL, in reference to a "Third Party Acquisition Proposal,"

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17 Schuster Dep. at 12; Baden Dep. at 83-84.

18 Schuster Dep. at 19, 84-86; Baden Dep. at 83-84, 143-44.

19 SMA at 36.

20 SMA § 7.2.

changes its recommendation for the Stone Merger.[21] The term Third Party Acquisition Proposal is defined under Section 10.1(i) as "an inquiry, offer or proposal" that is "conditioned upon the termination" of the Stone Merger Agreement and "abandonment" of the Stone Merger and in which the third party would acquire 30 percent or more of EPL.[22] Finally, the Stone Merger Agreement provides that if EPL's stockholders do not approve the Stone Merger in response to a Third Party Acquisition Proposal, EPL must pay Stone a $25.6 million termination fee.[23] The parties dispute how and why the merger came to be structured in this way.

D. ATS Hostile Tender Offer

After the signing of the Stone Merger Agreement, ATS announced a hostile tender offer for EPL on August 28, 2006.[24] The tender offer was for $23.00 per share and conditioned on the EPL stockholders voting down the Stone Merger Agreement.[25] On August 31, 2006, ATS formally launched the tender offer by filing its Schedule TO with the Securities and Exchange Commission.[26] With regard to Section 6.2(e), quoted in the

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21 SMA § 10.1(i).

22 *Id*.

23 SMA § 10.2(h).

24 Joint Pretrial Order at 4.

25 *Id*. The Court notes that under Section 7.13(b) of the Stone Merger Agreement the EPL board is free to change its recommendation of the merger, but that the agreement includes a "force the vote" provision permissible under 8 *Del C.* § 251(c). If the EPL stockholders vote down the increase in shares required to complete the merger, EPL would have to pay Stone a termination fee.

26 JX 16.

Schedule TO,[27] ATS stated that Richard Bachmann, CEO of EPL, told Don Voelte, Woodside's CEO, during a conversation on August 28, 2006 that "under the terms of the Stone Energy Merger Agreement, [EPL] would not be able to deal with [ATS] while this agreement was in force."[28] Whether this was in fact said is disputed by EPL.

E. Stone and EPL Dispute Interpretation of Section 6.2(e) as it Relates to the ATS Tender Offer

Stone and EPL have expressed differing interpretations of Section 6.2(e). Stone's brief suggests that 6.2(e) is not a "no talk" or "no shop" provision.[29] Yet in Baden's deposition, he expressly states that even "negotiations between EPL, ATS, and Woodside could result in a violation of Section 6.2(e)."[30] Implicit in Stone's position is that Section 6.2(e) does not unconditionally prevent EPL from talking; instead, the permissibility of any discussion, according to Stone, hinges on whether it would "reasonably be expected

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27 *Id*. at 27.

28 JX 16, ATS "Offer to Purchase" at 28; Schuster Dep. at 57-60, 112-14.

29 SAB at 38. Like most of its apparent concessions, however, Stone effectively qualifies its statement by appending the language of 6.2(e) to it. The effect is to render the "concessions" illusory. For example, Stone states in its answering brief:

> EPL is free to engage in any such conduct *so long as* in doing so EPL does not knowingly take, or agree to commit to take, any action that would violate any of EPL's affirmative covenants under the Merger Agreement or *would reasonably be expected* to: (i) cause the failure of a condition of the EPL Merger; (ii) materially impair the ability of the parties to consummate the EPL Merger; or (3 [sic]) materially delay the consummation of the merger consistent with § 6.2(e). *Id*. (emphasis added).

30 Baden Dep. at 148-49; *see also id*. at 35 (indicating that there may be situations where EPL could not even talk to ATS).

to impact the Stone Merger."[31] Stone reinforced the threat implied by their position by sending a reservation of rights letter to EPL concerning EPL's conduct up to September 18, 2006.[32] Having reviewed Stone's statements carefully, the Court concludes that, as a practical matter, Stone has conceded virtually nothing about the meaning of 6.2(e), not even that it permits EPL to talk to or negotiate with ATS.

The Rule 30(b)(6) deponents, Alan Baden and John Schuster (outside counsel for Stone and EPL, respectively), engaged in a series of conversations about the meaning of Section 6.2(e) and Stone's position on the section. EPL's 14D-9 SEC filing characterized those discussions as follows: "Stone's outside counsel informed EPL's outside counsel that Stone did not concur with EPL's interpretation of the Merger Agreement and that Stone believed the Company was prohibited from communicating with Woodside regarding the Offer."[33] According to Schuster, Baden initially said there was not a "no shop" provision, but later reversed course and twice stated EPL could not talk to ATS.[34]

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31 *See* Baden Dep. at 168-69 where he testified:

> [I]f the EPL board actively pursued a transaction which it knew would materially impair or delay the Stone transaction such as a merger with a third party conditioned upon the termination of the Stone merger agreement, and in approving that transaction also changed its recommendation, I believe that that transaction is in dire straits and could be deemed in violation of 6.2(e).

It is a small step from "such as a merger" to the ATS Tender Offer.

32 JX 23.

33 JX 11 EPL 14D-9 at 6.

34 Schuster Dep. at 55-57; *see also* JX 13.

Baden denies these allegations, but in the same breath says he does not recall whether he made the statements.[35] The facts reveal disagreement between the parties on this issue, which Stone's qualified representations to the Court have failed to dispel.

The evidence also demonstrates that although EPL wants to talk to ATS about the tender offer, Stone's position on Section 6.2(e) has deterred EPL from doing so.[36] Likewise, ATS wishes to engage in discussions with EPL.[37]

F. The Parties' Contentions

In C.A. No. 2402, EPL argues that 6.2(e) was not intended to be, and cannot be construed to be, a no-shop clause.[38] During the negotiations Stone proposed a reciprocal no-shop clause (with a fiduciary out) restricting EPL that EPL rejected. Stone acquiesced on that point.[39] EPL further argues that 6.2(e) cannot apply to what it calls "Strategic Alternative Transactions."[40] ATS argues that 6.2(e) is invalid to the extent it "prevents the EPL directors from fulfilling their fiduciary duties" and that it should be declared void as a matter of law and public policy.[41] Stone, through its briefs, depositions, and oral argument takes the position that 6.2(e) means what it says, but does not operate to

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35 Baden Dep. at 116.

36 Schuster Dep. at 110, 131-32.

37 September 22, 2006 Hearing Transcript ("Sept. 22 Tr.") at 45, 49.

38 EOB at 17.

39 Joint Pretrial Order at 3.

40 EOB at 26-29.

41 ATS Reply Br. ("ARB") at 11.

restrict EPL so long as any negotiations, recommendations, or third party agreement does not materially delay or impair the Stone Merger.[42] Stone maintains that the absence of an additional provision that would have enabled EPL to terminate the merger based on a third party transaction resulted from Stone's desire for "deal certainty."[43] Yet, the parties have stipulated that:

> During the negotiation of the [EPL-Stone] Merger Agreement, neither side commented on or mentioned Section 6.2(e) in their negotiations with each other.

And that:

> During the negotiation of the Plains Merger Agreement, there had been no discussion or negotiation regarding Section 6.2(e) between Plains and Stone.[44]

EPL therefore contends that Stone is trying to engraft new meaning on Section 6.2(e) that is not supported by the language of the agreement or the negotiating history.

G. Procedural History

On August 28, 2006, ATS, in its capacities as a shareholder of EPL and the bidder in a hostile tender offer, filed a Complaint seeking injunctive and declaratory relief against EPL, Stone, Richard Bachmann, as Chair and CEO of EPL, and EPL's other

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42 SAB at 13-14.

43 Sept. 22 Tr. at 62-63. An early draft of the Stone Merger Agreement contained a provision 10.1(j) that would have permitted Stone *or* EPL to terminate the agreement in response to a third party proposal. JX 2 at 50. The expedited trial on September 22 did not include Plaintiff Farrington's claims in a third related suit described *infra* that the absence of a reciprocal right on the part of EPL to terminate the agreement is problematic.

44 Joint Pretrial Order at 3-4.

directors. The ATS complaint alleges, among other things, that the combined termination fees from the Plains Merger and Stone Merger amount to improper penalties, are *per se* invalid based on their coercive effect and constitute a breach of fiduciary duties.[45] ATS also asserts several director breach of fiduciary duty claims [46] and that Stone has aided and abetted the EPL directors in their breach of fiduciary duty.[47] The following day, ATS moved to expedite their case and sought an immediate trial on the merits. I held a brief teleconference to clarify the issues on that motion on September 6, 2006.

On September 7, 2006, EPL filed an action for declaratory relief against Stone pertaining to Section 6.2(e) of the Stone Merger Agreement.[48] In its complaint, EPL seeks a declaratory judgment that Section 6.2(e) does not prohibit EPL from "soliciting, initiating, or encouraging from any person any inquiry, offer, or proposal that is reasonably likely to lead to a merger, consolidation, or other type of acquisition of [EPL], including discussing with third parties unsolicited acquisition proposals."[49]

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45 Complaint for Injunctive and Declaratory Relief ("ATS Compl."), at ¶¶ 20-30, 40-44. ATS's complaint also alleged that Section 2.9 of EPL's bylaws imposed a supermajority requirement on any actions taken by written consent, in violation of Section 228 of the Delaware General Corporation Law ("DGCL"). *Id.* at ¶¶ 31-36, 46-50. The EPL board recently amended Section 2.9 of its bylaws, thereby mooting this aspect of the ATS Complaint. *See* Letter from Edward Micheletti, on behalf of ATS, to the Court (Sept. 18, 2006).

46 *Id.* at ¶¶ 37, 51-60.

47 *Id.* at ¶¶ 61-64.

48 Complaint for Declaratory Relief in No. 2402-N ("EPL Compl."), at ¶¶ 14-17.

49 Prayer for Relief ¶ (a).

On September 11, 2006, Stone answered the EPL Complaint and moved to dismiss it on ripeness grounds. That same day, ATS amended its Complaint to add, among other things, a claim for a declaratory judgment that Section 6.2(e) of the Stone Merger Agreement is invalid *per se*. ATS also requested consolidation of its and EPL's cases, pursuant to Chancery Rule 42(a). After hearing argument on both motions on September 12, I granted the motion to consolidate on the narrow issue of Section 6.2(e) and took Stone's motion to dismiss under advisement for further consideration in connection with an expedited trial on the merits of the 6.2(e) issues to be held on September 22, 2006.

On September 12, 2006, Thomas Farrington, a stockholder of EPL, filed a complaint against Bachmann, the EPL directors, EPL, and Stone in his individual capacity and as a class action pursuant to Chancery Rule 23, seeking a declaratory judgment that the termination fees and several provisions of the Stone Merger Agreement are invalid and void, an injunction against the Stone Merger and any special meeting of EPL stockholders regarding it, as well as other relief.[50] Thereafter, Farrington filed a Motion to Expedite and Coordinate Proceedings ("Farrington Motion") and sought to participate in the September 22 trial. Stone and EPL opposed the Farrington Motion. In a conference on September 18, 2006, I granted the motion to the extent of directing the parties to coordinate pretrial activities in all three actions, but declined to include the

[50] *Thomas Farrington v. Richard A. Bachmann, et al.*, C.A. No. 2416 (Del. Ch. Sept. 12, 2006).

Farrington claims in the September 22 proceedings on the Section 6.2(e) issue, because the class action complaint raises a number of different issues.

Accordingly, I held a final hearing on the claims by EPL and ATS relating to the construction and validity of Section 6.2(e) of the Stone Merger Agreement on September 22. I also heard further arguments on Stone's motion to dismiss for lack of justiciability at the same time.

After the September 27 oral ruling, EPL submitted a letter to the Court, requesting "clarification" of two aspects of the ruling. The request amounts to a motion for reargument under Rule 59(f).[51] Specifically, EPL seeks clarification on the permissibility of "negotiation" with offerors of third party acquisition proposals and "solicit[ation]" of potential acquisition proposals. On October 4, Stone submitted its reply in which it consented to the inclusion of "negotiation" in the activities EPL can engage in pertaining to third party acquisition proposals, as defined in the Stone Merger Agreement. Stone objected, however, to the inclusion of "solicit" among the activities EPL could engage in on the ground that the Court already had ruled that EPL's claim on that issue is not ripe. In addition to explaining more fully the Court's September 27 oral ruling, this memorandum opinion also addresses EPL's request for reargument.

[51] Court of Chancery Rule 59(f), entitled "Reargruments," states that such a motion may be served and filed within five days after the filing of the Court's opinion or receipt of the Court's decision, which has been met here.

II. ANALYSIS

A. Legal Standard for a Declaratory Judgment

Parties to a contract can seek declaratory judgment to determine "any question of construction or validity" and can seek a declaration of "rights, status or other legal relations thereunder."[52] The Declaratory Judgment Act enables the courts to advance the stage at which a matter traditionally would have been justiciable,[53] allowing for the construction of a contract before or after a breach has occurred.[54] It is in this sense that declaratory relief is in the discretion of the Court and not available as a matter of right.[55]

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52 10 *Del. C.* § 6502.

53 *Rollins Int'l, Inc. v. Int'l Hydronics Corp.*, 303 A.2d 660, 662 (Del. 1973). *See also Horizon Pers. Commc'ns, Inc. v. Sprint Corp.*, 2006 WL 2337592, at *20 (Del. Ch. Aug. 4, 2006) (stating that one of the purposes of the Declaratory Judgment Act is so that parties may determine a controversy as to the interpretation of a contract provision before the time that an ordinary civil action for a monetary judgment would occur (quoting *Pan Am. Petroleum Corp. v. Cities Serv. Gas Co.*, 382 P.2d 645, 659 (Kan. 1963)).

54 10 *Del. C.* § 6503.

55 10 *Del. C.* § 6506 ("The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, will not terminate the uncertainty or controversy giving rise to the proceeding."); *Stroud v. Milliken Enters., Inc.*, 552 A.2d 476, 481 (Del. 1989).

This Court also notes a split in authority as to who should bear the burden of persuasion. *See Am. Legacy Found. v. Lorillard Tobacco Co.*, 886 A.2d 1, 18 (Del. 2005); Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d, § 2770. Consistent with the most recent decisions discussing this issue, in Delaware, "the better view is that a plaintiff in a declaratory judgment action should always have the burden of going forward." *Rhone-Poulenc v. GAF Chem.*, 1993 Del. Ch. LEXIS 49, at *7 (Del. Ch. Apr. 6, 1993); *see also Am. Legacy Found.*, 886 A.2d at 18.

B. Legal Standard for Justiciability

For a dispute to be settled by a court of law, the issue must be justiciable, meaning that courts have limited their powers of judicial review to "cases and controversies."[56] Even though the Delaware Constitution does not have a direct analog to Article III's "case or controversy" requirement, the analysis is generally the same.[57] The Delaware Supreme Court has articulated four prerequisites that must be met for an "actual controversy":

> (1) It 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

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[56] U.S. CONST. art. III, § 2. The doctrinal limits of justiciability not only stem from constitutional law, but also exist upon practical necessity. *See Poe v. Ullman*, 367 U.S. 497, 503 (1961) (observing that the "cases and controversies" limitation is based in part on the observation that the "adjudicatory process is most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity"); Erwin Chemerinsky, Federal Jurisdiction 43-124 (1989) (detailing the federal prohibition on advisory opinions, standing, ripeness, and mootness). "Concrete controversies [are] best suited for judicial resolution." *Id.* at 40. *See also Armstrong World Indus., Inc. v. Adams*, 961 F.2d 405, 410 (3d Cir. 1992) (prohibiting federal courts from issuing advisory opinions).

[57] *See Bebchuk v. CA, Inc.*, 902 A.2d 737, 740 (Del. Ch. 2006) ("The Delaware courts have announced justiciability rules that closely resemble those followed at the federal level."); *cf. Dover Historical Soc. v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1111 (Del. 2003) ("This Court has recognized that the *Lujan* requirements for establishing standing under Article III to bring an action in federal court are generally the same as the standards for determining standing to bring a case or controversy within the courts of Delaware.") (citing *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 904 (Del. 1994)).

> involved in the controversy must be ripe for judicial determination.[58]

In this case, the first and fourth prerequisites of an actual controversy are disputed.

1. An actual controversy must exist for the case to be justiciable

An actual controversy must exist for declaratory judgment jurisdiction.[59] Delaware courts must "decline to exercise jurisdiction over cases in which a controversy has not yet matured," to avoid rendering advisory opinions.[60] The basic inquiry is whether the parties' conflicting contentions present a genuine and substantial controversy between parties having adverse legal interests.[61] In evaluating the justiciability of a declaratory judgment claim, a court must determine whether "the facts alleged, under all the circumstances, show that there is a substantial controversy . . . of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."[62]

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58 *Rollins*, 303 A.2d at 662-63.

59 *See, e.g.*, *Gannett Co. v. Bd. of Mgrs. for the Del. Crim. Just. Info. Sys.*, 840 A.2d 1232, 1237 (Del. 2003) (stating broad rule).

60 *Stroud*, 552 A.2d at 480 (quoting *Schick Inc. v. Amalgamated Clothing & Textile Workers Union*, 553 A.2d 1236, 1239 (Del. Ch. 1987)). The Delaware Supreme Court underscores two policy reasons that are particularly relevant in this case. First, judicial resources are limited and to squander these resources on disagreements that may never ripen into a legal action creates an unwarranted impetus in future cases to seek judicial safety nets, wasteful of the Court's time and resources. Second, by rendering a judgment where the facts are not fully developed, a court not only runs the risk of granting a faulty judgment, but also of inappropriately and prematurely stepping into the development of law. *Id.*

61 *Anonymous v. State*, 2000 WL 739252, at *4 (Del. Ch. June 1, 2000).

62 *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 912 F.2d 643, 647 (3d Cir. 1990) (relying on *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

One argument Stone makes for dismissal is that certain aspects of this dispute are moot. The "actual controversy" requirement is the foundation for the mootness doctrine, which provides for dismissal of litigation if the alleged threatened injury no longer exists.[63] Similarly, if after the commencement of an action a party has been divested of standing, the mootness doctrine will render the proceeding unnecessary.[64] Accordingly, if, by virtue of post-filing events, the controversy no longer exists, a court generally cannot grant relief.[65] Two well-recognized exceptions to the mootness doctrine are: (1) where the issues are capable of repetition but likely to evade review; and (2) where the matter is of significant public importance.[66]

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63 *See, e.g., Cal. Pub. Employee Ret. Sys. v. Coulter*, 2005 WL 1074354, at *3 (Del. Ch. Apr. 21, 2005) (providing policy grounds for why a court should not resolve moot issues). This Court has often found a controversy moot when an imminent stockholder action has not yet occurred but would have the likelihood to render the matter moot. *See, e.g., Bebchuk*, 902 A.2d at 742 (refusing to adjudicate a bylaw challenge because the stockholders had not yet voted); *Gen. Data Comm. Indus. v. Wis. Inv. Bd.*, 731 A.2d 818 (Del. Ch. 1999) (same); *Diceon Elecs., Inc. v. Calvary Partners, L.P.*, 1990 WL 237089 (Del. Ch. Dec. 27, 1990) (same).

64 *Gen. Motors Corp.*, 701 A.2d at 823.

65 *Id.* at 823-24.

66 *Glazer v. Pasternak*, 693 A.2d 319, 320-21 (Del. 1997) (identifying that a moot controversy does not mandate dismissal if the situation is capable of repetition but of evading review); *Gen. Motors Corp. v. New Castle County*, 701 A.2d 819, 824 (Del. 1997) (recognizing exception to the mootness doctrine for matters of public importance).

2. A case must be ripe to be justiciable

The Delaware Supreme Court has emphasized that the declaratory judgment statute must not be used as a means to elicit advisory opinions from the courts.[67] Even when, as here, the case involves the duties of a fiduciary, a court cannot issue an "adjudication of hypothetical questions."[68] Courts must make a "practical judgment" in determining whether an action is ripe. A court may find a case justiciable where the interest in postponing review until the question arises in a more concrete and final form is outweighed by the immediate and practical impact on the party seeking relief.[69] In making this determination, the willingness of parties to litigate is immaterial.[70]

Worded differently, Plaintiffs must allege that "present harms will flow from the threat of future action."[71] Thus, if a plaintiff's action is "contingent," that is, if "the

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67 *See, e.g.*, *Ackerman v. Stemerman*, 201 A.2d 173, 175 (Del. 1964) (emphasizing that courts will not entertain solicitation of advisory opinions and that there must be a factual situation in existence giving rise to immediate and inevitable litigation; *Stroud v. Milliken Enters., Inc.*, 552 A.2d 476, 479 (recognizing this caveat even in light of the adoption of the Declaratory Judgment Act).

68 *Rollins*, 303 A.2d at 662; *Wilmington Trust Co. v. Haskell*, 282 A.2d 636, 639 (Del. Ch. 1971).

69 *Stroud*, 552 A.2d at 480 (quoting *Cont'l Air Lines, Inc. v. C.A.B.*, 522 F.2d 107, 124-25 (D.C. Cir. 1975)).

70 *Stabler v. Ramsay*, 88 A.2d 546, 549 (Del. 1952).

71 *Presbytery of New Jersey of the Orthodox Presbyterian Church v. Florio*, 40 F.3d 1454, 1463, 1466 (3d Cir. 1994) (quoting *Bell Atlantic Corp. v. MFS Commc'ns Co.*, 901 F. Supp. 835, 843 (D. Del. 1995)). Similarly, the Third Circuit held that the ripeness of a declaratory judgment action hinges on "the adversity of the interest of the parties, the conclusiveness of the judicial judgment and the practical help, or utility, of that judgment." *Step-Saver Data Sys., Inc.*, 912 F.2d at 647.

action requires the occurrence of some future event before the action's factual predicate is complete," the controversy is not ripe.[72] Therefore, Plaintiffs must show that "the probability of that future event occurring is real and substantial, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."[73]

C. EPL and ATS's Contentions on Justiciability

ATS seeks a declaration that Section 6.2(e) of the Stone Merger Agreement, as construed by Stone, is invalid. Because EPL and Stone disagree on the interpretation of Section 6.2(e), ATS contends that the dispute concerning the validity of Section 6.2(e) is justiciable.[74]

EPL's argument is more complicated. First, EPL contends that as a matter of contract interpretation Section 6.2(e) does not apply to "Strategic Alternative Activities."

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72 *Bell Atlantic Corp.*, 901 F. Supp. at 843; *Armstrong World Indus. v. Adams*, 961 F.2d at 411-12; *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 872 A.2d 611, 631-32 (Del. Ch. 2005) (stating that if future events may obviate the need for declaratory relief, then the dispute is not ripe), *aff'd in pertinent part and rev'd in part*, 901 A.2d 106 (Del. 2006).

73 *Anonymous v. State*, 2000 WL 739252, at *4 (citations and internal quotations omitted).

74 In the preliminary submissions of the parties on the motions to expedite and consolidate, questions were raised as to ATS's standing. That issue could not be briefed, argued or considered in any depth or detail in these expedited proceedings regarding Section 6.2(e). Based on ATS's status as a current stockholder of EPL, I have assumed for purposes of this opinion that it does have standing to challenge the validity of Section 6.2(e). *But see Omnicare, Inc. v. NCS Healthcare, Inc.*, 809 A.2d 1163, 1169 (Del. Ch. 2002). The Court also notes that whether ATS has standing to pursue its bifurcated and deferred claims for breach of fiduciary duty as to Section 6.2(e) or the challenged termination fee provisions is the subject of motions to dismiss by EPL and Stone that the Court currently has under advisement.

EPL defines this term to include developing, soliciting, considering, communicating, exchanging information, negotiating, disclosing, entering into or consummating potential or definitive strategic alternatives.[75] Alternatively, EPL argues that if Section 6.2(e) applies to Strategic Alternative Activities, it operates as a "no-talk" provision or otherwise restricts the EPL Board's ability to fulfill their fiduciary duties, thereby rendering the provision *ultra vires* and void.[76]

EPL also alleges that Stone's equivocation on the interpretation of Section 6.2(e) has prevented the EPL Board from even speaking with any third party offeror. The controversy surrounding Section 6.2(e), according to EPL, means that any correspondence its directors might have with ATS with respect to the ATS Tender Offer would subject the directors to substantial risk of a potential lawsuit by Stone. EPL alleges that the disputed language has created and continues to create a severe limitation on exploring the third party offer. Thus, EPL seeks to have this Court clarify the scope of Section 6.2(e) or invalidate it, so that the EPL board can explore the ATS and any other third party proposals that might arise and also pursue other Strategic Alternative Activities.

Stone argues that EPL and ATS have contrived an artificial dispute for adjudication. Stone maintains that Section 6.2(e) is not a "no-talk" or even a "no-shop"

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[75] EOB at 1. Many of these terms are drawn from § 10.1(i) (defining Third Party Acquisition Proposals) and § 7.2 (Stone no-shop provision) of the Stone Merger Agreement. *See* Sept. 22 Tr. at 8.

[76] EOB at 2.

provision and that, so long as EPL does not take an action that fits within the plain language of Section 6.2(e), EPL will not be in breach of the Stone Merger Agreement.[77] Stone maintains that EPL is not "outright unconditionally precluded" from talking to ATS or any other party interested in acquiring EPL and therefore denies the existence of an "actual controversy."[78]

Stone further argues that EPL's purported need to discuss the ATS Tender Offer with ATS is moot. Stone bases this contention on EPL's filing of a Schedule 14D-9 with the SEC, recommending the rejection of the ATS Tender Offer.[79] In the 14D-9, EPL states that three separate investment banker opinions have found the current ATS tender to be financially inadequate. In response to EPL's position, ATS declined to increase the price of its tender offer.[80]

In light of these arguments and the facts presented, the Court must evaluate two separate scenarios in terms of justiciability. First, Plaintiffs seek a determination of the applicability and validity of Section 6.2(e) as it pertains to Third Party Acquisition

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77 *See* Sept. 22 Tr. at 75-77. Stone contends that any alleged injuries that EPL has or may suffer are self-inflicted injuries. *See also id*. at 68-70 (Bruce Jameson, on behalf of Stone, responding to a hypothetical question, posited that a change in EPL director's recommendation with respect to the ATS Tender Offer, based on fiduciary duty obligations, would not be a breach of Section 6.2(e) ("[EPL has] recommended against it [the current ATS Tender Offer, but in the hypothetical would change their recommendation]. At that stage, Your Honor, I-I do not believe that would be a breach of 6.2(e).").

78 SAB at 38.

79 JX 11 at 8-9.

80 *Id.*; JX 30.

Proposals, as that term is defined in the Stone Merger Agreement. The ATS Tender Offer is an example of such a proposal. Second, EPL seeks a broader declaration as to its ability to explore and undertake Strategic Alternative Transactions.

1. Is there a justiciable dispute as to the impact of Section 6.2(e) on EPL's ability to explore Third Party Acquisition Proposals, such as the ATS Tender Offer?

As to EPL's ability to explore Third Party Acquisition Proposals, such as the ATS Tender Offer, the contentions of Stone regarding the import of Section 6.2(e) conflict with the positions of EPL and ATS. As EPL construes 6.2(e), it does not limit in any way EPL's ability to investigate the ATS Tender Offer and to communicate with ATS as the EPL Board sees fit. Stone denies that it contends Section 6.2(e) is either a no-shop or no-talk provision. Yet Stone's witness Baden testified that there are circumstances where negotiations between EPL and ATS could result in a violation of 6.2(e).[81] Referring to a scenario that would include a transaction like the ATS Tender Offer, Baden stated:

> [I]f the EPL board actively pursued a transaction which it knew would materially impair or delay the Stone transaction such as a merger with a third party conditioned upon the termination of the Stone merger agreement, and in proving [sic: approving] that transaction also changed its recommendation [in favor of the Stone Merger], I believe that transaction is in dire straits and could be deemed in violation of 6.2(e).[82]

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[81] Baden Dep. at 148-49, 35.

[82] Baden Dep. at 168-69.

Based on this and other testimony, combined with the equivocal and highly qualified letters, briefs, and arguments of Stone's representatives,[83] the Court agrees with EPL and ATS that, notwithstanding Stone's denial that it construes 6.2(e) as a no-talk provision, a genuine controversy exists here between parties with adverse interests regarding EPL's ability to explore the ATS Tender Offer.

The evidence also demonstrates that the controversy is substantial. As both EPL and ATS argue, the threat of a suit for actual damages for breach of a merger agreement that involves consideration on the order of a billion dollars can provide a powerful club to a party seeking to discourage competing transactions. According to ATS, Stone's actions raise the specter of a case like *Texaco v. Pennzoil*.[84] Moreover, Stone has argued that it would not be limited to its termination fee if EPL violated Section 6.2(e).[85]

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83 *See, e.g.*, Schuster Dep. at 49-50; JX 13 (correspondence between EPL's Schuster and Stone's Baden that reflect equivocation on Stone's position as to whether EPL can speak with ATS); Sept. 22 Tr. at 9 ("[The] fundamental problem as we [EPL] point out in great detail in our reply brief, is that Stone offers with the left hand and simultaneously takes back with the right hand."). ATS similarly maintains that Stone is using the threat of suit and Stone's "vague and undefined" interpretation of 6.2(e), "to shut the door on the EPL board's ability to take action in response to the ATS Tender Offer." ATS Opening Br. ("AOB") at 10-11.

84 *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. App. 1987) (awarding $8.53 billion in damages against Texaco that was found to have induced the Getty interests to breach their existing acquisition agreement with Pennzoil) *cited* in *Yanow v. Sci. Leasing, Inc.*, 1991 WL 165304, at *10 (Del. Ch. July 31, 1991).

85 *See* Sept. 22 Tr. at 60-63 (discussing whether a claim for breach for conduct occurring prior to the time they [EPL] changed their recommendation. Stone's counsel maintains that given the circumstances, the action "...would be a breach, and because it occurred prior to the termination, we would still have a claim to pursue that breach." *Id.* at 62-63. The Court understands from Stone's arguments

Furthermore, because the ATS Tender Offer remains pending with a fairly imminent closing date, the controversy over the meaning and validity of Section 6.2(e) has sufficient immediacy and reality to warrant consideration of declaratory relief.[86] In fact, I conclude that the issues presented and the provisions of the Stone Merger Agreement relevant to resolving them support the existence of an actual controversy ripe for judicial determination as to EPL's ability to respond to *any* Third Party Acquisition Proposal, as defined in Section 10.1(i) of the agreement. By definition, all such proposals, like the ATS Tender Offer, must be "conditioned upon termination of th[e Stone Merger] Agreement and the abandonment of the Merger."[87] Thus, under a literal reading of Section 6.2(e) numerous actions that might be taken as to exploring or negotiating about the ATS Tender Offer might "reasonably be expected to impair the ability" of Stone and EPL to "consummate the Merger."

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that it does not believe it would be limited to the termination fee for a violation of Section 6.2(e), but rather could elect to seek its actual damages.

86 *See Step-Saver Data Sys., Inc. v. Wyse Tech.*, 912 F.2d 643, 647 (3d Cir. 1990).

87 SMA at 50. Section 10.1(i) authorizes Stone to terminate the agreement if EPL's board "withdraws, modifies or changes its recommendation" of the agreement on the merger in a manner adverse to Stone in reference to a Third Party Acquisition Proposal. The Stone Merger Agreement further provides that if Stone terminates the agreement "under Section 10.1(i) (change of recommendation)" EPL shall promptly pay Stone the $26.5 million termination fee and that "[n]otwithstanding anything to the contrary contained herein," receipt by Stone of the termination fee "shall constitute full settlement of any and all liabilities of [EPL] for damages under this Agreement in respect of a termination of this Agreement." SMA § 10.2(g), (i).

Lastly, I find unpersuasive Stone's argument that the dispute over the effect of 6.2(e) on the EPL Board's ability to communicate with ATS is moot because the Board already has recommended against the ATS Tender Offer. By exploring the ATS proposal further, EPL might acquire, for example, information relevant to its assessment of the Stone Merger. Moreover, the fact that EPL has recommended against the ATS Tender Offer does not preclude the possibility of future changes in the terms of that offer or EPL's evaluation of it. At argument, Stone's counsel acknowledged EPL's right under the Stone Merger Agreement to change its recommendation on the Stone Merger in reference to the ATS Tender Offer.[88] The current dispute over the effect of 6.2(e) threatens to chill the EPL Board's willingness to explore the Tender Offer directly with ATS. Thus, the dispute is not moot.

2. Is there a justiciable dispute as to whether Section 6.2(e) restricts EPL's ability to pursue other Strategic Alternative Activities?

EPL also seeks a blanket declaration that Section 6.2(e) does not restrict EPL's ability to engage in each and all Strategic Alternative Activities, both in response to a third-party offer and of its own initiative. EPL asserts that Stone's preliminary proxy statement filed with the SEC on or about July 21, 2006 acknowledges EPL's ability to

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[88] Sept. 22 Tr. at 57-59 (Stone's counsel responding to the Court's request to elaborate on the final recommendation of the EPL board, stated: ("[The EPL] board has a right under the contract to change its recommendation [with respect to the EPL - Stone [M]erger]." *Id.* at 57. *See also id.* at 59 (Jameson responding in the affirmative to the Court's clarification: "But we are clear that they [EPL] have the right to change their recommendation or to recommend against the EPL-Stone [M]erger, and that wouldn't be any violation of their rights in and of itself").

engage in Strategic Alternative Activities.[89] That document stated that in a June 7, 2006 meeting, representatives of Stone and EPL agreed, subject to resolution of other issues, that EPL "would not have any restriction on its ability to explore other possible acquisitions or combinations." EPL also asserts that a plain reading of the 6.2(e) language and a contextual understanding of 6.2(e) in relation to other sections within the Stone Merger Agreement support this interpretation.[90] Moreover, even if the language is ambiguous, EPL contends that the extrinsic evidence supports its right to pursue Strategic Alternative Activities.[91]

In addition, ATS and EPL both argue that Section 6.2(e) is *per se* invalid under *Omnicare, QVC,* and *Quickturn*.[92] They further argue that under this Court's opinion in *Ace v. Capital Re,* Section 6.2(e) is invalid because "the board must be free to explore . . . a [third party] proposal in good faith."[93] Both ATS and EPL seek to have 6.2(e) declared null and void in its entirety. At argument, ATS argued alternatively that it would be sufficient for the Court to invalidate 6.2(e) only with respect to its tender offer.[94]

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89 JX 12 at 65; EOB at 17.

90 JX 1 at A43; EOB at 19, 20-24.

91 EOB at 27, 38.

92 ATS's Opening Brief ("AOB") at 1, 5-10; EOB at 29; *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914 (Del. 2003); *Paramount Commc'ns, Inc. v. QVC Network, Inc*., 637 A.2d 34 (Del. 1994); *Quickturn Design Sys., Inc. v. Shapiro,* 721 A.2d 1281 (Del. 1998).

93 *Ace, Ltd. v. Capital Re Corp.*, 747 A.2d 95, 107 (Del. Ch. 1999).

94 Sept. 22 Tr. at 117-18.

Stone replies by emphasizing that Section 6.2(e) is not written as a "no talk" or "no-shop" provision and does not operate as such because, in the context of the Stone Merger Agreement, it applies to EPL as the buyer and "addresses only conduct that would materially impair or delay the Merger."[95] Therefore, Stone argues, Section 6.2(e) is not a defensive response implicating policy concerns traditionally present in "no talk" or "no shop" provisions. Rather, Stone suggests that 6.2(e) "essentially articulates EPL's otherwise implied obligations of good faith and fair dealing," such that EPL will perform their end of the bargain.[96]

Stone further asserts that EPL seeks unreasonably broad declaratory relief. Stone argues that EPL has not identified any contemplated conduct or specific Strategic Alternative Activities that would provide a basis to test Section 6.2(e).[97] Stone cites to *Cantor Fitzgerald L.P. v. Cantor*, in which former Vice Chancellor, now Chief Justice Steele declined to rule on whether particular amendments to a partnership agreement were invalid on their face because the provisions lacked the context of any specific action or particularized allegations.[98] According to Stone, EPL's demand for declaratory judgment with respect to the broad category of Strategic Alternative Activities fits squarely within *Cantor* as an amorphous abstraction.

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95 SAB at 28.

96 *Id.* at 28-29.

97 EOB at 37.

98 2001 WL 1456494, at *6-7 (Del. Ch. Nov. 5, 2001).

In *Cantor,* the Court declined to address whether certain amendments to a partnership agreement were invalid based on a related settlement agreement on the ground that the dispute was not ripe. In that regard, the Court stated:

> Only after the amendments are applied in specific factual settings may the Court judge them, and, as there is no current effort to apply the provisions to the defendants, consideration of the issue is premature.

And later concluded:

> In this action, the defendants have directed the Court's attention to several ways in which the amendments might arguably violate the Settlement Agreement. I have withheld ruling on these arguments because the precise facts of the individual situations where it might be alleged in the future that a party may have violated this order will be determinative and the speculative contentions are not now ripe.[99]

A similar situation exists as to EPL's request for declaratory relief applicable to Strategic Alternative Activities beyond exploration of the ATS Tender Offer and Third Party Acquisition Proposals.

From a discretionary standpoint, entertaining this broad set of circumstances also runs the risk of creating bad law. Delaware courts should be especially cautious when the request for relief in a declaratory judgment raises "novel and important [issues] to Delaware Corporate law."[100] Based on the nature of Plaintiffs' claims and the absence of a specific factual setting, I consider the *per se* challenge to the validity of Section 6.2(e) in relation to the broad category of Strategic Alternative Activities unsuitable for

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99 *Cantor Fitzgerald, L.P. v. Cantor*, 2001 Del. Ch. LEXIS 137, at *8, 10.

100 *Bebchuk v. C.A., Inc.*, 902 A.2d at 740 (citing *Stroud*, 552 A.2d at 480-81).

declaratory relief. Plaintiffs seek a declaration that one section of a lengthy merger agreement is invalid in its entirety or has no application whatsoever to a broad and loosely defined set of activities that EPL *might* elect to engage in, because otherwise the section might impermissibly circumscribe the ability of EPL's directors to perform their fiduciary duties.

Regarding the importance of the issues presented, Stone argues that provisions like Section 6.2(e) are common in merger agreements and that invalidating this provision therefore would effect numerous other merger agreements. In an addendum to its answering brief, Stone cites 19 merger agreements with provisions similar to 6.2(e).[101] The Court examined the text of a dozen of the publicly available merger agreements cited by Stone. Notably, unlike the situation presented by the Stone Merger Agreement, none of those merger agreements required the parent's stockholders to vote on the merger.[102]

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[101] The present situation is distinguishable from the merger agreements cited in Defendant's Addendum where no parent stockholder vote is required in that the EPL board can still change its recommendation as to the Stone-EPL merger and, although there is a force-the-vote provision, stockholders can still vote down the merger agreement. In this sense, the vote of the EPL stockholders is not guaranteed as it was in *Omnicare*; thus, the consummation of the Stone-EPL merger is not a *fait accompli*. 818 A.2d at 939.

[102] Where no parent stockholder vote was required, the provisions similar to 6.2(e) conceivably could be construed as a type of "lock-up" guaranteeing deal certainty for the target and prohibiting the parent from engaging in *any* activity, strategic alternative or not, that would materially delay or impair the transaction. For example, one of the cited agreements provided:

> Parent: (ix) shall not, and shall not permit any of its Subsidiaries or affiliates to, take or agree to take any action (*including entering into agreements with respect to any acquisitions, mergers, consolidation or business combinations*) which would reasonably be expected to

In such an important area of the law, this Court must carefully evaluate policy implications and legal determinations, which can only be sufficiently explored in relation to a discrete set of facts. Adjudication of Plaintiffs' claims in such a sparse factual setting also runs the risk of wasting resources of both the Court and the parties. This Court is reluctant to suggest or encourage preenforcement review of each and every action of a director in the context of competing acquisition proposals.[103] Lacking concrete and substantial facts and recognizing the importance and complexity of the issues presented, I do not find sufficient immediacy and justification in the present circumstances to warrant the exercise of my discretion under 10 *Del. C.* § 6506 to consider the issuance of a declaratory judgment as it pertains to Strategic Alternative Transactions.

> prevent, materially delay or materially impair the ability of Parent to consummate the Merger and the other transactions contemplated by this Agreement. (Emphasis added).

SAB Addendum at A. 5. In contrast, where a provision like 6.2(e) appears in a transaction requiring the Parent's stockholders' vote, there is either a fiduciary out, in a no-shop provision or elsewhere, or more commonly, provisions like 6.2(e) are limited to actions in the "ordinary course of business," implicitly excluding strategic transactions. *See generally id.* at B. Thus, the specific context of Section 6.2(e) in the Stone Merger Agreement may be unusual.

103 *See, e.g., Ubiquitel Inc. v. Sprint Corp.*, 2006 Del. Ch. LEXIS 2, at *14-15 (Del. Ch. Jan. 4, 2006) (emphasizing that "this Court does not have the time, the resources, or the inclination to attempt to resolve all uncertainties that might exist with respect to contractual rights and obligations, especially where, as here, both sides are capable of evaluating the comparative risks of each position and acting accordingly.")

Plaintiffs' claims for relief as to activities other than responding to the ATS Tender Offer and other Third Party Acquisition Proposals are also premature under the rubric that, "[i]f future events may obviate the need for declaratory relief, then the dispute is not ripe."[104] Furthermore, the court should consider whether the case is not "fit" for review based on "uncertain and contingent events that may not occur as anticipated, or may not occur at all."[105] Here, based on the possibility that EPL will go forward with the Stone Merger, the uncertainty as to whether the discussions with ATS now permitted under this Court's declaratory judgment will bear fruit, and numerous other contingencies, the Court need not address EPL's claims with regard to other Strategic Alternative Activities or ATS's *per se* invalidity challenge.

Simply put, there is no "present harm" to EPL as a result of the speculative "future consequences" of pursuit of some third party proposal that falls outside the scope of that defined in Section 10.1(i) and this Court's declaratory judgment.[106] There are inadequate facts and the chance is too remote and speculative that a future event will occur that would precipitate a breach of contract claim by Stone for open-ended damages based on Section 6.2(e). As such, the Court concludes that the Strategic Alternative Activities portion of this declaratory judgment action is not justiciable because it is not ripe.

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104 *Wal-Mart Stores, Inc.*, 872 A.2d at 631-32.

105 *Bebchuk*, 902 A.2d at 740 (citations omitted).

106 *Florio*, 40 F.3d at 1463 (quoting *Bell Atlantic Corp.*, 901 F. Supp. at 843).

In its October 2 letter requesting reargument on the Court's September 27 oral ruling, EPL seeks "confirm[ation] that. . . EPL is permitted to 'solicit' potential third party acquisition proposals other than the ATS proposal."[107] In response, Stone argues that the Court's ruling held that the issue of "solicitation" of such proposals was unripe, and should not be revisited.[108]

Based on the standards of justiciability set forth above, the issue of whether EPL may engage in "solicitation" of acquisition proposals other than the ATS Tender Offer is premature. Under *Step-Saver* and *Ackerman*, EPL must allege facts that show a situation in existence and of sufficient immediacy that creates inevitable litigation to warrant a declaratory judgment.[109]

In these cases regarding the Stone Merger and in its October 2 letter, EPL asserts that its Board wishes to "solicit" potential alternative transactions. EPL does not allege, however, any facts relating to actions by Stone that create an immediate controversy over any solicitations by EPL. To the contrary, Stone has stated: "[I]f EPL chooses to solicit, discuss and/or negotiate other transactions, it can do so consistent with § 6.2(e) so long as EPL's parallel track towards consummation of the EPL-Stone Merger is unaffected."[110]

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107 Letter from Kevin Abrams, on behalf of EPL, to the Court (Oct. 2, 2006).

108 Letter from Bruce Jameson, on behalf of Stone, to the Court (Oct. 4, 2006).

109 *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 912 F.2d 643, 647 (3d Cir. 1990); *Ackerman v. Stemerman*, 201 A.2d 173, 175 (Del. 1964). *See also Anonymous v. State*, 2000 WL 739252, at *4 (Del. Ch. June 1, 2000) (identifying the burden of persuasion as that of the plaintiff).

110 SAB at 16.

Furthermore, EPL's October 2 letter makes clear that it believes it can solicit potential acquisition proposals without necessarily impairing its ability to complete the Stone Merger or materially delaying its closing.[111] EPL has not identified specific acts it intends to take by means of solicitation or alleged facts that suggest it faces an imminent threat of being sued. Whether and when such activity might occur that would create an alleged breach of contract is a highly factual inquiry and a matter of mere speculation at this time.

Based on these facts and the considerations mentioned in support of the September 27 oral ruling and this opinion, I am convinced that there is no actual and substantial controversy in terms of EPL's possible solicitation activities of "sufficient immediacy and reality to warrant the issuance of a declaratory judgment."[112] Thus, I deny EPL's request for reargument as to "solicitations." The facts indicate that EPL may engage in solicitation of other acquisition proposals at this time without being exposed to the threat of immediate or inevitable litigation; thus, there currently is no controversy on that issue ripe for judicial consideration.

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111 Mr. Abrams Oct. 2, 2006 letter at 4.

112 *Step-Saver Data Sys., Inc.*, 912 F.2d at 647.

III. Interpretation of the Stone Merger Agreement

A. Contract Construction Principles

The proper construction of a contract is purely a question of law.[113] Delaware courts interpret contracts from the perspective of an objective and reasonable third party.[114] The contract must also be read as a whole, so that the assessment of one section is consistent with the remainder of the contract.[115] Thus, a court must interpret contractual provisions in a manner that would give effect to every term of the instrument and reconcile all provisions of the instrument when read as a whole.[116]

A court must first determine whether a contract is ambiguous, or reasonably subject to more than one meaning.[117] Contractual terms will control if they establish both parties' common meaning where "a reasonable person in the position of either party

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113 *Lions Gate Entm't Corp. v. Image Entm't, Inc.*, 2006 Del. Ch. LEXIS 108, at *13 (Del. Ch. June 5, 2006); *Pellaton v. Bank of New York*, 592 A.2d 473, 478 (Del. 1991); *Reardon v. Exch. Furniture Store, Inc.*, 188 A. 704, 707 (Del. 1936).

114 *NBC Universal, Inc. v. Paxson Commc'ns Corp.*, 2005 Del. Ch. LEXIS 56, at *13-14 (Del. Ch. Apr. 29, 2005) (using the "objective" theory of contracts).

115 *Mehiel v. Solo Cup Co.*, 2005 Del. Ch. LEXIS 66, at *20 (Del. Ch. May 13, 2005). *See Pharm-Eco Lab., Inc., v. Immtech Int'l, Inc.*, 2001 WL 220698, at *7 (Del. Ch. Feb. 26, 2001) ("The court should construe the contract 'as a whole, considering each clause and word with reference to all other provisions and giving effect to each wherever possible.'") (citation omitted).

116 *Cove on Herring Creek Homeowners' Ass'n v. Riggs*, 2003 Del. Ch. LEXIS 36, at *14-15 (Del. Ch. Apr. 9, 2003)

117 *Cantera v. Marriott Senior Living Servs., Inc.*, 1999 Del. Ch. LEXIS 26, at *4 (Del. Ch. Feb. 18, 1999).

would have no expectations inconsistent with the contract language."[118] A contract is not ambiguous in a legal sense merely because the parties in litigation differ on its meaning or construction.[119] Rather, contract ambiguity exists only when the controverted provisions are fairly susceptible of different interpretations or have two or more different meanings.[120]

If a contract is unambiguous, evidence beyond the language of the contract may not be used to interpret the intent of the parties or to create an ambiguity.[121] This is certainly the case where sophisticated corporations are involved.[122] As this Court repeatedly has noted, parties who elect to join together to pursue an enterprise have substantial knowledge of business operational frameworks, allowing for both parties "to make a thoughtful election with full knowledge of the significance of the operational framework they choose."[123] Accordingly, if a court finds that disputed contract language

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118 *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).

119 *City Investing Co. Liquidating Trust v. Cont'l Cas. Co.*, 624 A.2d 1191, 1198 (Del. 1993); *NBC Universal, Inc.*, 2005 Del. Ch. LEXIS 56, at *13-14.

120 *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

121 *Pellaton v. Bank of New York*, 592 A.2d at 478.

122 *See Progressive Int'l Corp. v. E.I. du Pont de Nemours & Co.*, 2002 WL 1558382, at *1 (Del. Ch. July 9, 2002) ("Sophisticated parties are bound by the unambiguous language of the contracts they sign.").

123 *Cantor Fitzgerald, L.P. v. Cantor*, 2001 Del. Ch. LEXIS 137, at *16-17 (Del. Ch. 2001) (quoting *In re Marriott Hotel Props. II L.P. Unitholders Litig.*, Del. Ch., C.A. No. 14961, Allen, C. (June 12, 1996)).

is unambiguous, then the court should rely solely on the clear, literal meaning of the words of the contract.[124] If ambiguity exists, the court may use extrinsic evidence to assess the parties' intentions.[125] In determining the weight of parol evidence, a court may consider overt statements or acts of the parties, the business context, prior dealings between the parties, business customs or usage in the industry.[126]

B. The Plain Language of the Merger Agreement Permits EPL to Pursue "Third Party Acquisition Proposals"

As related to the ability of EPL to investigate "Third Party Acquisition Proposals" as defined in Section 10.1(i), the Court finds no ambiguity in the language of Section 6.2(e). When viewed in the context of the entire Stone Merger Agreement, I conclude that Section 6.2(e) does not prevent EPL from investigating, negotiating about, or pursuing the ATS Tender Offer or any other Third Party Acquisition Proposal.

Article VI of the Agreement is entitled, "Conduct of Business Pending the Merger." It contains two sections, 6.1 and 6.2. Section 6.1 obligates the Target, Stone, between signing and closing to operate its business "in the ordinary course consistent with past practice" and not to take certain actions without the written consent of Parent, EPL. Section 6.1 contains 21 subparagraphs describing the types of actions subject to it. Section 6.2 obligates the acquirer, EPL, not to take certain types of actions before the

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124 *Liquor Exch., Inc. v. Tsaganos*, 2004 Del. Ch. LEXIS 166, at *5 (Del. Ch. Nov. 16, 2004).

125 *Pellaton v. Bank of New York*, 592 A.2d at 478.

126 *Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1, 13 (Del. Ch. 2003).

closing without the written consent of Stone. It includes 7 subparagraphs, including the controverted Section 6.2(e).

The preamble to Section 6.2 makes clear that the language of the entire contract must be taken into consideration when construing the subsections of 6.2.[127] Interpreting the contract as a whole, the Stone Merger Agreement acknowledges and accounts for situations where EPL may be subject to third party proposals, even proposals that are conditioned on the termination of the Stone Merger.[128] For example, under Section 10.1(h), either EPL or Stone can terminate the Stone Merger if the target, Stone, accepts a Target Superior Proposal.[129] The Stone Merger Agreement also reflects that, consistent with its fiduciary duties to its stockholders, EPL may change its recommendation of the Stone Merger.[130] This right is reflected in Section 7.13, for example. Section 7.13(b) requires EPL to hold a special meeting of its stockholders to secure their approval of the

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127 Section 6.2 uses the phrase "[e]xcept as expressly permitted or required by this Agreement. . ." to preface the subsections. Accordingly, based on principles of contract construction as well as the explicit language of its preamble, Section 6.2(e) must be read in light of EPL's rights and obligations under the overall Stone Merger Agreement.

128 *See* SMA § 10.1, accounting for and defining valid termination situations. "Third Party Acquisition Proposal" is defined for Section 10.1(i) as "an inquiry, offer or proposal" that is "conditioned upon the termination" of the merger agreement and "abandonment" of the merger and in which the third party would acquire "30% or more" of EPL. SMA at 50.

129 SMA § 10.1(h), defining a "Target Superior Proposal" as a bona fide written Target Acquisition Proposal not solicited by Target and made by a third party in accordance and without breaching § 7.2(a) (a no-shop provision applicable to Stone). Stone's acceptance of such a proposal would expose it to liability to pay the Target Termination Fee.

130 SMA §§ 7.13(b), 10.1(i).

Stone Merger. The section explicitly states, however, that it does not prohibit EPL's Board from modifying its recommendation to its stockholders if the Board in consultation with independent legal counsel "determines in good faith that such action is necessary . . . to comply with its fiduciary duties."

In addition, Section 10.1(i) explicitly recognizes that EPL might withdraw or modify its recommendation in reference to a proposal conditioned upon the termination of the Stone Merger Agreement and abandonment of the Merger, *i.e.*, a Third Party Acquisition Proposal, such as the ATS Tender Offer. In the words of Section 6.2(e), one could argue that such a change of recommendation "would reasonably be expected to materially impair the ability of [the parties] to consummate the merger." The other provisions of the Stone Merger Agreement, however, indicate that Stone's remedy for EPL changing its recommendation in reference to a Third Party Acquisition Proposal is to terminate the agreement and receive the EPL Termination Fee.[131]

Taken together, these provisions are internally consistent with the plain reading of the Stone Merger Agreement. The provisions indicate that the parties contemplated that just such an event as the ATS Tender Offer might occur and that in reference to it, EPL's board, consistent with its fiduciary obligations, could investigate or pursue the Third Party Acquisition Proposal and potentially recommend against the Stone Merger. Under the plain language of the entire merger agreement, EPL is free to pursue Third Party

131 *See* SMA §§ 10.1(i), 10.2(g), (i).

Acquisition Proposals that qualify under the definition in 10.1(i).[132] Nothing in the Stone Merger Agreement suggests that Section 6.2(e), as part of the provisions governing conduct of the business of the acquirer pending the merger, should be read to be inconsistent with the plain language of Sections 7.13(b) and 10.1(i) and the recognition implicit in those sections that EPL would have the ability to explore Third Party Acquisition Proposals and negotiate about them, if it determines that to be advisable.[133]

The Stone Merger Agreement has an unusual combination of provisions, or rather absence of provisions, which arguably might cause Section 6.2(e) to function in a manner and a specific situation that its drafters may not have appreciated. That is, when Stone and EPL agreed that there would not be a "no-shop" provision applicable to EPL and removed Section 10.1(j) that would have given EPL the right to terminate the Stone Merger Agreement in response to a third party proposal, they may have created the possibility of an ambiguity in the application of Section 6.2(e) in the face of some third party transaction. The parties apparently dispute whether this was intentional to assure

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132 *See Phillips Home Builders v. Travelers Ins. Co.*, 700 A.2d 127, 129 (Del. 1997) ("When there is a written contract, the plain language of a contract will be given its plain meaning.").

133 *See Capano v. Capano*, 2003 WL 22843906, at *5 (Del. Ch. Nov. 14, 2003) ("'Where there is an inconsistency between general provisions and specific provisions, the specific provisions ordinarily qualify the meaning of the general provision.' This is so because of the 'reasonable inference that specific provisions express more exactly what [the] parties intend than broad or general terms.'") (citations omitted).

"deal certainty" for Stone, or inadvertent as EPL maintains.[134] The Court need not resolve any such dispute for purposes of its decision, based on the plain language of the Agreement, as to exploration of the ATS Tender Offer and Third Party Acquisition Proposals. For the reasons stated in Part II.C.2 *supra*, it is premature to consider any additional and potential factual situations that might fall under the broad umbrella of Strategic Alternative Activities.

1. Even if extrinsic evidence is considered, the Stone Merger Agreement Permits EPL to pursue "Third Party Acquisition Proposals"

Even if the Court were to find an ambiguity in Section 6.2(e) when read in the context of the Stone Merger Agreement as a whole, which it does not, an analysis of relevant extrinsic evidence would resolve that ambiguity against Stone. The undisputed evidence shows that the parties did not discuss Section 6.2(e) in their negotiations, and that it was a hold over from the Plains Merger Agreement.[135] Also, although Stone requested that EPL agree to a no-shop provision that would bind EPL on terms comparable to Stone's, EPL repeatedly and consistently rejected that request.[136] At a meeting of the parties' representatives on June 7, 2006, Stone agreed that EPL would not be bound by a no-shop; hence, the final agreement does not contain a no-shop restraining

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134 *See* Sept. 22 Tr. at 63-64, a discussion of Stone's rejection of the proposed Section 10.1(j), which would have permitted EPL to terminate the agreement in the event they accepted a Third Party Acquisition Proposal, so that Stone could maintain "a certain amount of deal certainty." Stone refers to EPL correspondence that confirms their understanding of 10.1(j) as consistent with Stone's interpretation.

135 Joint Pretrial Order at 3.

136 *Id*.

EPL.[137] Thus, construing Section 6.2(e) to preclude EPL from communicating or negotiating with ATS or the maker of any other Third Party Acquisition Proposal would be inconsistent with the extrinsic evidence and contrary to the parties' manifest intent.

2. Delaware law supports a construction of 6.2(e) that permits EPL to pursue "Third Party Acquisition Proposals"

The reasoning of *Ace v. Capital Re* supports the same result. In *Ace*, in the context of a request for injunctive relief *pendente lite*, the Court construed a disputed contractual provision that arguably impermissibly circumscribed the directors' unfettered ability to fulfill their fiduciary duties.[138] The provision at issue in that case was a fiduciary out clause associated with a "no-talk" provision conditioned, "on the written advice of [the target's] outside legal counsel, that participating in such negotiations or discussions or furnishing such information is required in order to prevent the Board of Directors of the Company from breaching its fiduciary duties to its stockholders."[139] The dispute involved whether the "written advice" requirement had been satisfied. Vice Chancellor Strine reasoned that under one interpretation of *QVC* there would likely never be a case where the board was *required* to speak to a third party in a non-change of control

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137 *Id*.

138 *See Ace Ltd. v. Capital Re Corp.*, 747 A.2d 95, 103-04 (Del. Ch. 1999) (holding that if Ace's interpretation is correct, it is "likely invalid"); *see also* Restatement (Second) of Contracts § 193 (1981) (a "promise by a fiduciary to violate his fiduciary duty or a promise that tends to induce such a violation is unenforceable on public policy grounds.").

139 *Ace*, 747 A.2d at 98.

transaction.[140] The Vice Chancellor added, however, that should such a situation occur, the provision might then be construed as "an abdication by the board of its duty to determine what its own fiduciary obligations require."[141] If so interpreted, such a contractual provision would be inconsistent with the director's fiduciary duties and, therefore, invalid.[142] To avoid this result, the Court held that the provision more likely would be construed consistently with the board's fiduciary duties.

Similar reasoning applies here. In interpreting the ACE-Capital Re merger agreement, the Court recognized that the parties to the transaction were aware of the scope of the directors' fiduciary duties and, in effect, construed the provisions of the agreement consistent with those duties.[143] This conclusion comports with the record established in this case in terms of the EPL-Stone merger. For example, when asked whether EPL could recommend in favor of the ATS Tender Offer, Stone's counsel

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140 *Id*. at 107 (finding that the *Ace* factual situation did not present such a scenario); *see also id*. at 107-08 ("But QVC does not say that a board can, without exercising due care, enter into a non-change of control transaction affecting stockholder ownership rights and imbed in that agreement provisions guaranteeing that the transaction will occur and that therefore absolutely preclude stockholders from receiving another offer that even the board deems more favorable to them.").

141 *Id*. at 106-07.

142 *Id*. at 104.

143 *Id*. at 109 ("As a sophisticated party, . . . ACE was on notice of its possible invalidity. This factor therefore cuts against its claim that its contract rights should take precedence over the interests of the Capital Re stockholders who could be harmed by enforcement of § 6.3.) (citing *QVC*, 637 A.2d at 51; Paul L. Regan, Great Expectations? A Contract Law Analysis For Preclusive Corporate Lock-Ups, 21 CARDOZO LAW REV. 1, 76-81 (1999)).

responded, "I do not believe that would be a breach of 6.2(e)."[144] Likewise, throughout Stone's briefs, it vigorously maintains that there is no *per se* ban on EPL's speaking to ATS or shopping the transaction. Implicit in these representations is a recognition that such a complete ban would likely be incompatible with the directors' fiduciary duties and, therefore, void.[145] The structure of the no-shop provision applicable to Stone and the clauses in the nature of fiduciary outs in the Stone Merger Agreement demonstrate that Stone and EPL recognized this reality. Accordingly, the Court construes the Stone Merger Agreement, in general, and Section 6.2(e), in particular, as being consistent with that understanding and permitting EPL to explore Third Party Acquisition Proposals, as long as it does so in good faith.

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144 Sept. 22 Tr. at 82. Whether, consistent with Section 6.2(e), EPL could change its recommendation against the ATS Tender Offer to one in favor of it based on its communications with ATS is an interesting, hypothetical extension of the Court's ruling that EPL has the right under the Stone Merger Agreement to explore Third Party Acquisition Proposals, like the ATS Tender Offer. That issue is not ripe, however, for several reasons. First, EPL publicly has recommended against the ATS Tender Offer based on three different opinions from investment bankers that the price was too low. There is no basis beyond mere speculation to believe that EPL would change that recommendation. Second, Stone's counsel's statement that he did not believe a change of recommendation as to the ATS Tender Offer would breach 6.2(e) suggests that Stone might not claim a breach or might consent to EPL's changing its recommendation. That possibility is made more likely by the legal constraints on contractual attempts to circumscribe the ability of directors to fulfill their fiduciary duties. In short, future events may well obviate or moot this issue; thus, it is not ripe for judicial consideration at this time.

145 *Cf. Ace*, 747 A.2d at 107 (discussing a superior proposal and noting that "the board must be free to explore such a proposal in good faith").

C. Plaintiffs' *Per Se* Invalidity Claims as to Exploration of Third Party Acquisition Proposals, such as the ATS Tender Offer

With regard to Plaintiffs' *per se* invalidity claims as to the application of Section 6.2(e) to the ATS Tender Offer or other Third Party Acquisition Proposals, the Court's construction of the Stone Merger Agreement and 6.2(e) as permitting exploration of such proposals eliminates the predicate for those claims. Accordingly, the Court need not address them further.

IV. CONCLUSION

For the reasons stated, I hold that EPL and ATS are entitled to a declaratory judgment that Section 6.2(e) of the Stone Merger Agreement does not limit the ability of EPL to explore in good faith any Third Party Acquisition Proposals, including the ATS Tender Offer. I hereby dismiss without prejudice all of the other aspects of EPL's claims in C.A. No. 2402-N as not ripe and failing to provide a sufficient actual controversy to enable or persuade the Court to exercise jurisdiction over those claims under 10 *Del. C.* §§ 6501-13. Regarding the *per se* invalidity claim as to Section 6.2(e) in the ATS complaint, C.A. No. 2347-N, I deny the requested relief as it relates to EPL's consideration of any Third Party Acquisition Proposals, including the ATS Tender Offer, as moot based on my construction of 6.2(e); in all other respects ATS's *per se* invalidity claim as to Section 6.2(e) is dismissed without prejudice as not ripe for the same reasons as the comparable portions of the EPL claims.

IT IS SO ORDERED.