IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

IN RE AMERICAN CAPITAL, LTD. SHAREHOLDER LITIGATION

Case No. 422598-V

MEMORANDUM AND ORDER

On June 24, 2016, the plaintiffs brought suit on behalf of the common stockholders of American Capital, Ltd. ("American Capital" or "the Company"), shortly after the Company publicly announced that it had entered into a merger agreement with Ares Capital Corporation ("Ares"). The defendants moved to dismiss and to stay discovery. In a written decision filed on October 12, 2016, the court denied the defendants' motion to dismiss and denied the motion to stay discovery.[1] The plaintiffs did not seek to enjoin the merger, which closed on January 3, 2017, after it was approved by a majority of the Company's stockholders.

On February 10, 2017, the plaintiffs filed a Second Consolidated Amended Class Action Complaint.[2] This complaint named as defendants the former members of American Capital's board of directors, as well as certain of its former officers. The new complaint also named Elliott Management Corporation ("Elliott Management" or "Elliott"), a Delaware corporation with its principal office in New York City, as a new

[1] *In Re American Capital, Ltd Shareholder Litigation*, 2016 MDBT 3 (Oct. 12, 2016) (*available at* http://www.courts.state.md.us/businesstech/pdfs/mdbt3-16.pdf). The court also granted the defendants' motion for a protective order, in part, as to certain documents sought by the plaintiffs. That discovery order is not germane to the matters currently before the court.

[2] DE #89. A "corrected" Second Consolidated Amended Class Action Complaint was filed on April 24, 2017. DE #99.

defendant. Also named as new defendants were Elliott Associates, L.P., a Delaware limited partnership with its principal office in New York City, Elliott International, L.P., a Cayman Islands limited partnership that is wholly owned by Elliott Associates, L.P., and Elliot International Capital Advisors Inc., a Delaware Corporation that is wholly owned by Elliott Associates, L.P. For convenience, these defendants will also be collectively referred to as "Elliott" or "Elliott Management." As will be discussed below, Elliot Management appears to have been the catalyst for the merger.

Elliott Management has been referred to by the plaintiffs throughout this case as an "activist hedge fund." This appellation is not necessarily pejorative. Frequently, however, the term is applied to professional financial engineers that pressure a public company through a variety of otherwise lawful means to undertake certain actions under the rubric of "increasing stockholder value."[3] In many instances, the hedge fund's actual goal is to cause a short term rise in the target company's stock price, and then to substantially decrease its equity position shortly thereafter.[4] The cycle then repeats with another public company.

The Chief Justice of the Delaware Supreme Court has offered the following description of an activist hedge fund in a recent piece he wrote for a major law journal.

> Hedge funds, unlike private equity funds, will not buy a company's entire equity and arrange their own financing, as is typically required when a full change of control happens. Rather, hedge funds will not bear that kind of risk and wish for the option of trading out of the company's equity. If a hedge fund can push a target into a merger with a lucrative target-side

[3] *See* John C. Coffee, Jr. & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 41 J. CORP. L. 545, 562 (2016).

[4] Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite?: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L.J. 1870, 1892 & n. 70 (2017).

> premium, that will facilitate the hedge fund's exit, but the hedge fund has no desire to be the acquirer in that kind of transaction. And when the hedge fund succeeds in changing the target's business plan in other ways through pressure strategies, the hedge fund typically will make no commitment to remain as a long-term stockholder.[5]

On the day of the motions hearing, June 9, 2017, the court was informed that the plaintiffs had settled with American Capital, and its officers and directors.[6] At this time, therefore, the only remaining defendants are Elliott Management. As discussed with counsel at the hearing, the court has decided to consider the issues of personal jurisdiction over Elliott Management and whether Elliott Management was a "controller," thus triggering judicial review under the entire fairness standard rather than the more deferential business judgment standard.[7]

Standards of Review

The court will apply Maryland procedural law to Elliott Management's motion to dismiss for lack of personal jurisdiction. Delaware substantive law, however, applies to

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[5] *Id.* at 1902 (footnotes omitted). Some commentators have been less decorous in their language than the Chief Justice. *See* S. Denning, The Seven Deadly Sins of Activist Hedge Funds, FORBES (Feb. 15, 2015); *An Investor Calls*, THE ECONOMIST (Feb. 5, 2015).

[6] As this case was filed as a class action, the settlement with these defendants remains subject to court approval under Md. Rule 2-231(h).

[7] *See Kahn v. M&F Worldwide Corp.*, 88 A.3d 635, 644 (Del. 2014) ("[E]ntire fairness is the highest standard of review in corporate law. It is applied in the controller merger context as a substitute for the dual protections of disinterested board and stockholder approval, because both protections are potentially undermined by the influence of the controller. However . . . that undermining influence does not exist in every controlled merger setting, regardless of the circumstances."). Other issues nevertheless remain to be decided, including whether the proxy omitted material information and whether stockholder vote otherwise "cleansed" the transaction. *Corwin v. KKR Financial Holdings, LLC*, 125 A.3d 304, 308-08 (Del. 2015); *see Singh v. Attenborough*, 137 A.3d 1512, 152-53 (2016); *In re Merge Healthcare Inc. Stockholder Litig.*, 2017 WL 395981 (Del. Ch., Jan. 30, 2017).

the merits of the plaintiffs' claims.[8] With respect to the substantive claims for relief, the court will not refer to matters outside of the amended complaint (or the documents referred to and incorporated into the amended complaint). In other words, notwithstanding that some discovery has taken place, the court will not convert Elliott Management's substantive dismissal motion into a motion for summary judgment.[9] With respect to personal jurisdiction only, the court has considered matters outside of the pleadings.[10] This review of materials outside of the amended complaint solely for this purpose does not have the effect of converting Elliott Management's motion into one for summary judgment.[11]

In considering whether colorable claims for relief have been stated in the complaint, the court "must assume the truth of all well-pleaded relevant and material facts as well as all inferences that reasonably can be drawn therefrom. Dismissal is proper only if the alleged facts fail to state a cause of action."[12] In making its decision, "the court must view all well-pleaded facts and the inferences from those facts in a light

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[8] American Capital's principal office was in Maryland at the time suit was filed. It was, however, a Delaware corporation and Delaware substantive law governs the substantive claims for relief.

[9] *See Smith v. Danielczyk*, 400 Md. 98, 104-05 (2007); *Hrehorovich v. Harbor Hospital Center*, 93 Md. App. 772, 782-83 (1992), *cert. denied*, 330 Md. 319 (1993).

[10] In this regard, the court has reviewed the depositions of Malon Wilkus (American Capital's former CEO) and John Erickson (American Capital's former CFO). The court has also reviewed e-mails between Elliott Management and American Capital, e-mails between Elliott Management and American Capital's investment bankers, Goldman Sachs and Credit Suisse, and e-mails between Elliott Management and Ares, the company that acquired American Capital.

[11] *Bond v. Messerman*, 391 Md. 706, 718 (2006); *Beyond Systems, Inc. v. Realtime Gaming Holding Co., LLC*, 388 Md. 1, 11-12 n. 10 (2005).

[12] *A.J. DeCoster Co. v. Westinghouse Elec. Corp.*, 333 Md. 245, 249 (1994).

most favorable to the plaintiff[s]."[13] The court credits facts, and reasonable inferences from those facts, but not "conclusory charges that are not factual allegations."[14] Dismissal is proper "if the alleged facts and permissible inferences, so viewed, would, if proven, nonetheless fail to afford relief to the plaintiff[s]."[15]

Background

American Capital was a Delaware corporation with its principal offices in Bethesda, Maryland. Before the merger, it was a publicly traded global asset manager and a private equity firm. Both directly and through its asset management business, American Capital underwrote and managed investments in middle market private equity, leveraged finance, real estate, and structured products. As of March 31, 2016, American Capital managed $20 billion of assets. American Capital's stock price plus dividend distributions resulted in an annualized growth rate of 13.6% since its IPO.

Ares is a specialty finance company that provides financing to middle market companies, venture backed businesses, and power generation projects. Ares also originates and invests in senior loans and mezzanine debt. Ares is externally managed by Ares Capital Management LLC, a subsidiary of Ares Management, L.P.

From 2014 through 2015, American Capital's board regularly considered strategic options for the company. In 2014, American Capital's board approved a plan to split the company by transferring most of American Capital's assets into two newly established business development companies ("BDCs"), each of which would be managed by

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[13] *Lloyd v. General Motors Corp.*, 397 Md. 108, 122 (2007); *Hrehorovich*, 93 Md. App. at 781.

[14] *Morris v. Osmose Wood Preserving*, 340 Md. 519, 531 (1995).

[15] *Arffa v. Martino*, 404 Md. 364, 381 (2008) (quoting *McNack v. State*, 398 Md. 378, 388 (2007)).

American Capital. American Capital planned to spin off the new BDCs to its stockholders, resulting in three publicly traded companies. In May 2015, the board revised the plan so as to spin off only one BDC, which was anticipated to own most of American Capital's existing investments and to be managed by American Capital.

In a November 4, 2015, press release, American Capital announced that its net asset value per share was $20.35. On February 17, 2016, American Capital issued a press release reporting its financial results for the quarter and year ended December 31, 2015. Consolidated net operating income before taxes for the year and quarter were reported to be $378 million and $95 million, respectively. In that same press release, American Capital announced that it planned to continue its ongoing share repurchase program as "an excellent way to enhance stockholder value."

On May 6, 2016, American Capital issued a press release reporting its financial results for the quarter ended March 31, 2016. Consolidated net operating income before taxes was reported to be $94 million. The net asset value per share was reported to be $20.14, a $0.26 per share increase from the December 31, 2014, net asset value of $19.88 per share. For the quarter ended March 31, 2016, American Capital reported earnings per share of $0.40, compared to consensus estimates of $0.26 per share. On May 10, 2016, J.P. Morgan issued an analyst report updating its target price for the Company's stock to $18.00 per share.

As noted above, on November 5, 2014, American Capital publicly announced that its board had approved a plan to split its businesses by transferring most of its investment assets into two newly established BDCs, each of which would be managed by American Capital. This plan was revised a few months later such that only one new BDC would be

created, again, to be managed by American Capital. To that end, American Capital filed a preliminary proxy statement on September 20, 2015, pursuant to which it sought stockholder approval of the spin-off. In that proxy statement, the Company and the board stated that "the Spin-Off is in the best interests of American Capital and its stockholders," and provided numerous reasons for that determination. Management's plan, however, was never implemented.

At 6:58 a.m. on November 16, 2015, Patrick Frayne of Elliott Management sent an e-mail directly to Malon Wilkus, American Capital's chief executive officer, in Bethesda, Maryland. The subject line read: "Urgent Shareholder Call: Elliott Contesting proxy." The body of the e-mail stated: "Elliott is reporting an 8.4% interest in [American Capital] via a 13D this morning. We intend to file a preliminary proxy contesting the Spin Out Proposal. We would like to discuss this with you as soon as possible, so that we can explain our rationale."[16]

At 7:15 a.m., on November 16, 2015, Wilkus received a call in Maryland on his cellphone from Elliott Management representatives, who advised him that Elliott had secured a large position in his company's stock and was planning to launch a proxy contest to remove him, senior management, and the board. During this call, Wilkus unsuccessfully attempted to dissuade Elliott from taking action. Shortly after the call, at 8:06 a.m., Joseph Jackson of Elliott Management sent to Wilkus, in Maryland, three documents. The first document was a thirty-seven page attack on American Capital's management and the spin out proposal which had recently been announced to its stockholders. The second document was a three-page letter directed to American

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[16] Elliott Management was required to publicly disclose its ownership interest in American Capital within ten days of reaching a 5% threshold. 15 U.S.C. §78m(d) (2012); 17 C.F.R. §240.13d-1 (2015).

Capital's board of directors, at its Bethesda, Maryland headquarters, criticizing the board and management. The third document was a press release on those same subjects.

Later that same day, Elliott made public its letter to the American Capital board. Elliott also issued the press release it had sent to Wilkus and the board announcing that it had launched a website (www.bettteracas.com) urging American Capital stockholders to vote against management's planned spin-off. In that same press release, Elliott disclosed to the public that it had sent a letter to American Capital's board in which Elliott attacked company management, questioned the qualifications of its directors, and questioned the company's compensation practices. Elliott also opined in that release that American Capital's stock was "worth in excess of $23 per share." Among other things, Elliott urged the Company to withdraw the spin-off plan, replace its board of directors, and undertake a "strategic review." That same day, Elliott filed a proxy statement with the SEC contesting the vote on the upcoming spin-off, and urging American Capital stockholders to vote against every proposal made by the board, including urging the stockholders to vote against the appointment of certain directors and against the adoption of the Company's proposed 2016 equity incentive plan. American Capital's management and board were taken by complete surprise, and the Company's e-mail boxes were flooded with analyst reports of Elliott's attack and anxious messages from stockholders.

On the next day, November 17, 2015, representatives of American Capital met with representatives of Elliott. In preparation for the meeting, one of the Company's bankers, Goldman Sachs, told American Capital "not [to]say anything that you would not want to see in a subsequent letter to shareholders" and "not [to] 'say no' to any request for board representation."

Two days later, on November 19, 2015, American Capital voted to increase the size of its board of directors by one member, to ten, and appointed David G. Richards to fill the newly-created position. American Capital gave Richards a one-time cash award of $100,000.00. That same day, Frayne of Elliott Management e-mailed Wilkus and John Erickson, American Capital's chief financial officer, asking for a follow-up telephone conference. On November 20, 2015, during the requested telephone conference, Elliott Management told Wilkus that he should resign and that Elliott was going to publicly call for his resignation. Wilkus was, understandably, quite upset.

The next day, at 4:33 p.m., Joseph Jackson of Elliott Management sent an e-mail to American Capital's vice-president of investor relations, asking for "the e-mail addresses for the current ACAS board plus the [general counsel]." He was given one hour to respond. Less than an hour later, at 5:18 p.m., Elliott Management sent another letter to American Capital's board of directors at its Bethesda, Maryland, headquarters. This letter, after noting that Elliott Management held "an interest in excess of 8.4%," went on to complain about Wilkus' conduct during the telephone conference the previous day. The letter was transmitted by e-mail to Wilkus and to Samuel Flax, American Capital's general counsel, in Bethesda, Maryland, as well as to the individual board members. In that letter, Elliott demanded that the directors "investigate these actions and to take appropriate measures . . . ." The letter ended by stating, "Elliott intends to hold this Board responsible for taking all actions necessary to prevent Mr. Wilkus from harming the Company."[17] After that, Elliott Management generally by-passed Wilkus

[17] Although versions of the November 20, 2015, conversation vary, Wilkus told Elliott that American Capital with him was worth $28 per share, and without him, $6 per share. Apparently, Elliott took this as a threat by Wilkus to "tank" the company. Wilkus denied making any such

and dealt directly with board members, the company's bankers, or other members of management.

On November 23, 2015, American Capital began drafting a press release that would announce the formation of a "strategic review committee" as a response to Elliott Management's pressure. That same day, Elliott filed an amendment to its Schedule 13D, reporting an increase in its ownership of American Capital to 9.1%. Also on that same day, American Capital held a conference call with Elliott, and provided it with a "draft" of the press release for Elliott's comment. Elliott re-wrote the press release, and sent it back to American Capital with the warning: "There isn't really any flexibility except for minor cosmetic stuff." Elliott reminded American Capital that its "alternative plan [a proxy contest] is ready to go and we have until 4pm to establish a path ahead." On that same day, Wilkus received a letter from Ares, in which Ares noted Elliott's public criticism and suggested that American Capital engage in a transaction with Ares, concluding that this is a "critical time for you and your colleagues."

The next day, November 24, 2015, American Capital's board instructed management to undertake a strategic review of the company's prospects, including the sale of the company, just as Elliott had demanded. In sum, within the span of a little more than one week, the board all but abandoned its strategic alternative – the spin off – that just two months prior it had determined to be in the best interests of American Capital's stockholders. After allowing Elliott to red-line its own press release, American Capital publicly announced the strategic review. That same day, Elliott Management wrote to Wilkus and the members of the American Capital board, with respect to the

threat. In his view, he was simply reiterating that the company was worth $28 per share on a standalone basis and should not be the subject of a quick sale.

strategic review: "We intend to monitor the process closely by engaging in dialogue with prospective buyers, bankers and shareholders to ensure that the Company is *vigorously pursuing the process*." (Emphasis in original).

On December 1, 2015, Elliott again wrote to Wilkus and the American Capital board at the Company's Bethesda headquarters to "suggest" its approach to the strategic review process. Among other things, Elliott asked to meet directly with American Capital's investment bankers – Goldman Sachs and Credit Suisse – and directly with the special committee of the board which would undertake the strategic review. Elliott reminded American Capital: "There is some urgency in getting these meetings set."

Two days later, on December 3, 2015, Elliott management demanded that American Capital sell itself by the end of the first quarter of 2016, or Elliott would seek to replace the board and management. On December 7, 2015, four days later, Elliott Management provided American Capital and its board with "recommendations for how ACAS should run a value-maximizing process for the company." Included was a list of potential acquirers.

On December 11, 2015, Elliott Management again wrote to the American Capital board, concluding: "Elliott believes now more than ever that the Independent Committee should *proceed expeditiously to sell the Company*."[18] (Emphasis added). On December 15, 2015, Elliott reported that it had increased its stake in American Capital to 10.3%.

On January 7, 2016, the Company announced that the board had authorized management to solicit offers to purchase the company, in whole or in part. Elliott

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[18] Although Elliott's first meeting with members of the strategic review committee took place in New York, Elliott stated in its December 11, 2015, letter that it "would be open to traveling to Bethesda" for such a meeting.

Management called members of the strategic review committee the very next day, reiterating its view that the sale of the company was "clearly the right course of action."

On January 14, 2016, Elliott Management asked American Capital to push back the date of its annual meeting, thereby delaying the annual stockholders meeting and the director nomination deadline. Elliott stated: "We have readied directors, but we don't believe that's the best course forward *to the extent the company is pursuing the sale path.*" (Emphasis added). By that afternoon, senior management began circulating June 30, 2016, as the new date for the annual meeting and, on January 15, 2016, after another call with Elliott Management, the board set June 30, 2016, as the new date for the company's annual meeting.

On January 15, 2016, Ares made an unsolicited offer to purchase American Capital's outstanding stock for $16.00 per share. Ares stated that it viewed the company's strategic review as a "sale process" only. On January 19, 2016, Elliott sent a letter to American Capital's board, addressed to its Bethesda, Maryland headquarters, expressing its concern over the "slow pace" of the solicitation of offers and urging the Company to begin discussions with the most promising potential acquirers. Elliott urged American Capital "to reach a deal as soon as possible." Elliott Management's e-mails to the company, its bankers, and its board members noted that "we've been closely monitoring the strategic review process at American Capital." Later that same day, American Capital's financial advisers met by telephone with representatives of Elliott. By this point, American Capital's bankers believed, correctly, that Elliott Management was working with Ares.

On January 26, 2016, Elliott again amended its Schedule 13D, reporting that it now owned 11.9% of American Capital's stock. On February 16, 2016, Elliott raised its stake in American Capital to 13.2%. One day later, Patrick Frayne of Elliott e-mailed Wilkus and John Erickson to note that Elliott "went through the 10K this morning," and requested a conference call. The following day, February 18, 2016, Joseph Jackson of Elliott e-mailed Wilkus and Erickson in Bethesda, communicating that Elliott wished "to share some thoughts about markets, ACAS investment strategy, sale process and communication between ACAS and Elliott." That same day, Richards e-mailed the entire board and advised that Elliott was among the Company's two or three largest stockholders and thus had the ability to control a stockholder vote. On February 19, 2016, Elliott had another call with the Company's investment bankers and admonished them to finalize the Company's assets sales process, even if that meant selling at a loss.

On February 22, 2016, the Company produced three alternative scenarios to a quick sale of the whole Company. The values ranged from $23.9 per share, with the Company remaining a BDC and selling only ACMM, to $19.34 per share, through an orderly liquidation over a two-year period. The eventual merger consideration from Ares was $17.40 per share, with $2.45 of that value from the sale of ACMM, which the Company's stockholders already owned. Despite these models and management's opinion that more dollars could be returned to the stockholders either by remaining a standalone or through an orderly liquidation, the board continued to push for a sale of the company, as demanded by Elliott. Further, the special review committee and the Company's investment bankers withheld management's liquidation scenario projections from the board.

On February 23, 2016, American Capital invited eleven parties to participate in a second round of due diligence, four of which had expressed an interest in buying the whole company. Shortly thereafter, on March 10, 2016, Elliott began negotiating a "settlement" with the Company that provided for the reduction of the board from ten to nine members, the resignation of five directors, four directors to be nominated by Elliott and certain registration rights for Elliott. The next day, Elliott reported another increase in its holdings of the Company's stock. On March 14, 2016, the board reset its annual meeting from June 30, 2016, until July 29, 2016, thereby once again extending the deadline for Elliott to file a competing proxy.

On March 15, 2016, American Capital requested final bids from the remaining interested parties. On March 18, 2016, Elliott e-mailed Richards and Neil M. Hahl, who also served on the board of directors, thanking them for moving the annual meeting "while protecting our ability to nominate directors." Shortly thereafter, the strategic review committee ordered a member of Company management, McHale, to review management's liquidation scenario to lower the ranges of values. Despite these revisions, McHale reported that the value to stockholders under an orderly liquidation was still $19.65 to $18.50 per share. In contrast, the implied value of Ares' merger consideration was $17.40 per share, which included the sale of ACMM.

On April 4, 2016, Elliott e-mailed the members of the strategic review committee and the Company's bankers noting that "a public proxy fight [with Elliott] would likely be a distraction from the critical process at hand. By pushing out the annual meeting date further this has been averted/postponed, but we still are positioning ourselves to pursue a

slate of directors." Four days later, Ares' board approved a final bid to be submitted to American Capital.

On April 8, 2016, American Capital received bids to acquire the whole company from Ares, Apollo, HNA, and Party 5, as well as two bids to acquire specific lines of business. American Capital's board met several more times in April 2016 to consider the bids that had been received. On April 14, 2016, the board was told that Apollo's high bid range was $18.12, while Ares' high bid range was just $17.50. On April 18, 2016, Ares and others submitted revised bids.

On April 20, 2016, Elliott signed a confidentiality agreement with American Capital, thereby affording it unfettered access to the review process of the American Capital board. The Company's board met on April 21, 2016, at which time Apollo's bid was still higher than Ares' bid.

American Capital representatives met with Elliott on April 22, 2016, and provided Elliott with information regarding the bids that had been received as well as the board's review process. At that point, Erickson had concluded that a sale was a foregone conclusion.

On April 27, 2016, Elliott told American Capital that it might become a bidder, but withdrew that suggestion on May 3, 2016, as Elliott declined to sign the proposed non-disclosure agreement. On May 2, 2016, HNA proposed purchasing the whole company for $18.50 per share, contingent on a 30-day exclusive negotiation and further due diligence period. On May 4, 2016, HNA advised that it was not prepared to move forward with ACMM excluded from the transaction, but that it stood by its $18.50 all-

cash bid for the whole company. Erickson nonetheless told McHale to '[p]lease be sure your team keeps this bid very quiet."

On May 11, 2016, Ares and Elliott signed a confidentiality agreement to allow Elliott access to Ares' bid information. That same day, American Capital's financial advisors, along with board members from the strategic review committee, met with representatives of Elliott to discuss the bids that had been received. At the meeting, American Capital's legal and financial advisors discussed key transaction terms that were being negotiated with Ares and another party. At the meeting, Elliott expressed "a preliminary preference" for Ares' bid. On May 11, 2016, Elliott filed an amendment to its Schedule 13D, reporting that it had increased its stake in American Capital to 14.4%.

Also on May 11, 2016, the Company's bankers were told to disregard management's January 2016 forecasts, to use lower May 2016 forecasts, and not to use any liquidation forecasts at all. On that same date, Elliott told Hahl that Ares would be "significantly more attractive" to Elliott as a buyer than Apollo, and that Elliott favored an immediate sale, even at lower values, rather than the continued operation or orderly liquidation of the Company. Hahl told the board that Elliott "wanted action much sooner than the two-year timeframe" that an orderly liquidation would take.

On May 12, 2016, Apollo *sua sponte* advised the Company that it was willing to increase its proposal by $50 million, or $17.36 per share, contingent upon an exclusivity agreement. The board rejected the Apollo proposal without attempting to seek additional value.

On May 13, 2016, Ares submitted a revised offer to American Capital, contingent upon entering into an exclusivity agreement and American Capital ceasing its pre-

authorized stock buy-back program. That same day, representatives of American Capital, Ares and Elliott met to discuss Ares' proposal. Among other things, Ares and Elliott began negotiating a voting agreement to lock in Elliott's support for any agreement between Ares and American Capital.

On May 16, 2016, Hahl told the Board that Elliott preferred a sale to Ares over a liquidation. On that same date, Elliott asked American Capital to enter into a "settlement agreement" in consideration, at least in part, of Elliott signing a voting agreement with Ares. Among other things, Elliott warned that the American Capital board would be "reconstituted" and the chairman removed if the Ares deal did not close. To that end, Elliott requested that a majority of the board resign (including Wilkus), that Elliott get to appoint a majority of the board, and that the Company pay Elliott $5 million as reimbursement for expenses.

On May 17, 2016, Elliott requested a copy of the draft merger agreement between American Capital and Ares. Also on that date, American Capital and Elliott exchanged drafts of a term sheet for the "settlement agreement" Elliott requested. On May 18, 2016, American Capital sent Elliott a revised draft of the requested settlement agreement, which Elliott promptly rejected. Elliott countered with a proposal that four board members would be appointed by Elliott and that Wilkus must resign, and warned that another "strategic review" would be started immediately if a sale did not close. On May 18, 2016, Elliott advised that it would "accept 3mm in expense reimbursement."

On May 18, 2016, Ares sent the board a presentation regarding the merger, indicating that Ares intended to fund the transaction with $1.8 billion in cash from the Company. American Capital's board met on May 19, 2016, to discuss the Ares bid and

the proposed agreement with Elliott. A revised agreement with Elliott was prepared on May 20, 2016. The boards of both American Capital and Ares approved the merger on May 22, 2016. The merger was publicly announced on May 23, 2016.

In summary, on May 23, 2016, a little over six months after Wilkus received an e-mail from Elliott at 6:58 a.m., American Capital announced that it, along with Ares and certain of their subsidiaries, had entered into a merger agreement under which Ares would acquire American Capital, excluding one subsidiary, for approximately $3.43 billion in cash and stock. Under the agreement, American Capital stockholders were to receive $6.41 in cash and 0.483 shares of Ares common stock. Simultaneously, American Capital announced a separate transaction under which the excluded subsidiary, American Capital Mortgage Management, LLC, would be sold to American Capital Agency Corp. for $562 million, or approximately $2.45 per share.[19]

On June 6, 2016, American Capital's board approved the settlement agreement with Elliott, and Elliott amended its Schedule 13D to reflect an ownership interest in American Capital common stock of 15.9%. Under the settlement agreement, if the Ares merger did not close, four incumbent board members would be replaced, with one selected by Elliott and three to be mutually agreed upon by Elliott and American Capital. The current chairman of the board, defendant Malon Wilkus, would resign and be replaced by the newly reconstituted board. Also, the strategic review committee would be reconstituted, with two members selected by Elliott and two members selected by the newly reconstituted board. American Capital further agreed not to increase the size of its board over ten members without Elliott's written consent. In exchange, Elliott agreed not to launch a proxy fight at any time before the 2017 annual meeting and to vote its shares

[19] This separate transaction closed on July 1, 2016. It did not require stockholder approval.

in favor of management's board nominees at the 2016 annual meeting. Finally, and most peculiarly, American Capital agreed to pay Elliott $3 million for fees and expenses "incurred in connection with their involvement with the Company, including but not limited to expenses incurred in connection with the [Ares] Transaction and the [Ares] Support Agreement."

Ares filed a Registration Statement on July 20, 2016, the final version of which was used to solicit the votes of American Capital stockholder to support the Ares merger. As noted, Elliott and Ares agreed that Elliott would vote its shares in favor of the merger.[20]

Discussion

Personal Jurisdiction

Elliott Management contends that the complaint must be dismissed for lack of personal jurisdiction. The plaintiffs disagree, arguing that although Elliott Management may never have set foot in Maryland,[21] its contacts with the State with respect to the Ares transaction were systematic, continuous, and substantial such that under a "minimum contacts" analysis Elliott Management can be required to answer for the transaction in a Maryland court.[22]

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[20] A stockholder vote approving the merger was held on December 15, 2016, and the transaction closed on January 3, 2017.

[21] Physical presence is not required for a non-resident to have transacted business in Maryland under the Long Arm Statute, Md. Code Ann., Cts. & Jud. Proc. § 6-103(b)(1). *Snyder v. Hampton Indus., Inc.*, 521 F. Supp. 130, 141 (D. Md. 1981); *Bahn v. Chicago Motor Club Ins. Co.,* 98 Md. App. 559, 568 (1993).

[22] *International Shoe Co. v. Washington,* 326 U.S. 310, 320 (1945).

When a defendant moves to dismiss for lack of personal jurisdiction, the court must first determine whether the complaint's allegations fairly invoke any of the provisions of the long arm statute.[23] Second, the court must ascertain whether the exercise of personal jurisdiction in the forum state would comport with due process.[24] Frequently, the analysis collapses into a pure Fourteenth Amendment analysis because the transacting business prong of the Maryland long arm statute reaches to that extent.[25] Of course, the long arm statute is not construed as to encompass circumstances under which the exercise of personal jurisdiction over the non-resident would violate Due Process.[26]

The ultimate questions are whether this suit arises out of or relates to Elliott's contacts with Maryland, whether Elliott transacted business in Maryland, and whether it purposefully availed itself of the privileges of conducting business in the this State. Elliott contends that it did not transact business in Maryland within the meaning of the long arm statute and that, in any event, it is has never purposefully availed itself of the benefits and protections of Maryland law such that it would be constitutionally reasonable to require it to defend this case in a Maryland court. Elliott notes that is has no place of business in Maryland, owns no property in Maryland, did not physically enter

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[23] The plaintiffs, correctly, have not contended that a Maryland court may exercise personal jurisdiction over Elliott Management under a theory of general jurisdiction. *See BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549 (2017); *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). Their arguments are limited to the concept of "specific jurisdiction." *See CSR, Ltd. v. Taylor*, 411 Md. 457, 477-78 (2009).

[24] *Dynacorp Ltd. v. Aramtel Ltd.*, 208 Md. App. 403, 478-79 (2012).

[25] *CSR Ltd.*, 411 Md. at 475; *see Tire Engineering v. Shandong Linglong Rubber Co.*, 682 F.3d 292, 301 (4th Cir. 2012).

[26] *Bond*, 391 Md. at 721; *see Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017).

the State in connection with the transaction in question, and did not enter into any contracts in Maryland. Elliott contends that, at most, it sent a few e-mails and placed a few telephone calls to American Capital's Bethesda office, but otherwise conducted all of its activities with respect to American Capital outside of the State. According to Elliott, most if its contacts with the American Capital board took place in states other than Maryland, specifically New York, Arizona and Florida. In its view, this case is bereft of the type of contacts that courts traditionally have seen when exercising personal jurisdiction over a foreign entity in a specific jurisdiction case.[27]

The plaintiffs see the record developed in discovery very differently. They contend that Elliott transacted business in Maryland within the meaning of the long arm statute and had, with respect to the Ares transaction, sufficient contacts with Maryland to allow this court to exercise personal jurisdiction over Elliott consistently with the Due Process clause. In support of their contention, the plaintiffs point to the quantity and quality of the contacts initiated by Elliott Management and directed to American Capital, its officers, and board members in Maryland.

Although American Capital was chartered in Delaware, its headquarters was in Bethesda, Maryland. Its chief executive officer and other executive officers worked in Maryland, and were repeatedly contacted by Elliott with respect to the "strategic review" and ultimately the Ares transaction in correspondence directed to the Bethesda office. The majority of American Capital's employees were based in Maryland (Bethesda and Annapolis), and over one hundred and thirty of those Maryland-based employees were laid off as a result of the Ares merger.

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[27] *See Bond*, 391 Md. at 723-25.

American Capital's board of directors met in Maryland, both generally and specifically, with respect to the transaction which is at the center of this case, and Elliott repeatedly directed communications to the board at the Company's Bethesda, Maryland headquarters. As detailed in the amended complaint, Elliott initiated at least ten key telephone calls with American Capital representatives in Maryland. Critically, it was Elliott Management, not American Capital, that either initiated the calls or solicited information from American Capital about the status of the sales process that Elliott initiated.

As for e-mails, the amended complaint details the existence and substance of at least thirty e-mails initiated by Elliott Management and directed to American Capital in Maryland, all pushing American Capital to sell the company quickly or face the ouster of its board and management through a proxy contest. Indeed, it is Elliott Management that started this whole process, and the events that gave rise to this case, when it sent an e-mail to American Capital's former chief executive officer in Maryland at 6:58 a.m. on November 16, 2015, critiquing his stewardship of the company, the performance of management, and questioning the qualifications of the board of directors. Quite clearly, Elliott threatened a proxy fight if the board did not retreat from its spin-out proposal.

Until the very end of the process, when the Ares transaction closed, Elliott Management enmeshed itself in the company's strategic review process and in the board's deliberative process, constantly offering "guidance" or "suggestions." This is not a case of intermittent or episodic contacts with Maryland. Elliott intentionally directed its efforts towards the sale of a Maryland-based company, repeatedly and pointedly. Its

contacts with the board and corporate officers in Maryland during the merger process were repeated and substantial – not episodic or happenstance.

Reading the amended complaint as a whole, the court easily concludes that Elliott Management was not simply a concerned stockholder looking to share its views or offer a few suggestions to the board. Elliott Management intentionally acquired a large position in American Capital stock for a single purpose, and thereafter increased its position in the Company's stock for a single purpose: to force American Capital to sell itself quickly to a suitor of Elliott Management's preference so that Elliott could make a short term gain. According to the amended complaint this is, in fact, what happened – Elliott forced American Capital to sell itself in a short six-month period, and reaped a 20% return on its investment. In addition, Elliott received $3 million in "reimbursement" of Elliott's own expenses from American Capital as recompense for Elliott's efforts in facilitating the sale of the Company to Ares.

Elliott Management, not so subtly, repeatedly threatened to oust the chief executive officer and the board of American Capital if Elliott's interests – a quick sale of the company – were not pursued with the requisite vigor. According to the amended complaint, Elliott was willing to leave substantial "shareholder value" on the table because it wanted a quick sale. Elliott did not want to wait the 1-2 years it would have taken to realize even greater stockholder value, either by a sale to a higher bidder, such as Apollo or HNA, or the orderly liquidation of the Company's assets. Although Elliott Management may have been perfectly within its rights under Delaware and federal law to conduct its business in the manner in which it did, the putative legality of Elliott

Management's conduct does not insulate it from having to defend its actions in this specific case in a Maryland court.

By virtue solely of its own conduct, Elliott Management has easily satisfied the transacting business prong of the Maryland long arm statute and the purposeful availment requirement of the Due Process clause.[28] This manifestly is not a situation in which a plaintiff has sought to weave together a few e-mails and telephone calls to manufacture a case of specific jurisdiction over an out-of-state actor.[29] This also is not a case in which a non-resident has been haled into court solely because of random, fortuitous, or attenuated contacts.[30] A defendant such as Elliott had fair warning that it might be subject to a Maryland court when it purposefully directed its activities at forum residents and "the litigation results from alleged injuries that 'arise out of or relate to' those activities."[31] Elliott had fair warning in this case and its contacts with Maryland – not those of some other actor – have subjected it to litigation in this forum.

The Plaintiffs' Substantive Contentions

The plaintiffs' claims can be grouped roughly into three categories: (1) a flawed process by the board, including allowing Elliott to dominate the bidding process; (2) an

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[28] *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

[29] Courts have sustained the exercise of personal jurisdiction on contacts less substantial than those in this case. *See English & Smith v. Metzger*, 901 F.2d 36, 38-40 (4th Cir. 1990); *Capital Source Finance, LLC v. Delco Oil, Inc.*, 520 F. Supp. 2d 684, 690-91 (D. Md. 2007); *Marycle, LLC v. First Choice Internet, Inc.*, 166 Md. App. 481, 500-09 (2006).

[30] *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299 (1980); *CSR, Ltd.*, 411 Md. at 486.

[31] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)).

unfair merger price; and (3) disclosure violations.[32] As noted at the outset of this decision, the court will first determine whether the plaintiffs have adequately pleaded that Elliott was a controlling stockholder.

In the plaintiffs' view, the Ares merger was simply the board's response to intense pressure from Elliott to force the board to sell the company quickly, on Elliott's terms, or to be ousted in a proxy fight. The plaintiffs posit that in September 2015, the board publicly announced a strategic plan but, in response to pressure from Elliott, did an about-face, not only promptly retracting its own ideas for maximizing value but then immediately caving into Elliott's desire for a quick sale of the Company. The plaintiffs also note that on November 15, 2015, Elliott not only publicly questioned management's effectiveness, but also roundly criticized the company for poor capital deployment, excessive overhead, not having qualified directors, and for implementing a "compensation [system] that rewards failure." In short, the plaintiffs see the merger agreement with Ares as nothing short of the predictable result of Elliott ramping up pressure on the board to sell the Company quickly, or else be ousted by Elliott in a proxy fight.

Elliott, by contrast, argues that an independent board carefully evaluated proposals from eighteen bidders out of the over one-hundred that were solicited by the Company's financial advisers. Elliott contends that the board was able to extract a premium strategic transaction with Ares that was the best value reasonably available to

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[32] All of the claims in the amended complaint attempt to plead variants of the breach of the duty of loyalty. Because the merger has closed, all duty of care claims have likely been eliminated by the Company's charter exculpation provisions. *See In re Cornerstone Therapeutics Inc., Stockholder Litigation,* 115 A.3d 1173, 1175-76 (Del. 2015).

the stockholders. Elliott argues that the board's actions were simply a reasonable response to input from a significant stockholder, and not the abdication of its fiduciary responsibilities to maximize stockholder value under *Revlon*.[33] Elliott also argues that the plaintiffs have failed to allege that Elliott had any financial interest different from that of the other holders of common stock.

When a stockholder owns less than 50% of the voting stock, a plaintiff must plausibly allege domination by that minority stockholder through actual control of corporate conduct.[34] Under Delaware law, a minority stockholder is not considered to be a controller unless it in fact owns more than 50% of the voting stock or exercises such formidable power such that it exercises actual control over corporate decision-making.[35] In this case, the plaintiffs contend that the amended complaint sufficiently pleads that Elliott was a controller for a specific transaction – the Ares transaction – and then reaped unique benefits from the transaction not shared by the other common stockholders. If proven, they contend, Elliott would constitute a controller under Delaware law.[36]

Delaware courts frequently confront allegations that a minority stockholder was a controller but rarely conclude that control was sufficiently alleged. Although it is a "fact-intensive" inquiry, it is a high wall rarely scaled.[37] Vice Chancellor Glasscock recently summarized the doctrinal landscape:

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[33] *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

[34] *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 70 (Del. 1989).

[35] *Kahn v. Lynch Communications*, 638 A.2d 1110, 1113-14 (Del. 1994).

[36] *In re Primedia Inc. Derivative Litig.*, 910 A.2d 248, 257-58 (2006).

[37] In *In re Crimson Exploration, Inc. Stockholder Litig.*, 2014 WL 5449419 at *10 n. 50 (Del. Ch., Oct. 24, 2014), the Chancery Court surveyed a list of significant cases in which the central

> As is well-established, a plaintiff can shift the standard of review from the business judgment rule to entire fairness by either establishing the presence of a controlling stockholder on both sides of the transaction or showing that at least half of the directors who approved the transaction were not disinterested or independent.
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> A stockholder who owns less than 50% of the voting power of a Corporation may still qualify as a controller – and owe fiduciary duties if he exercises control over the business affairs of the corporation. To invoke entire fairness, the Complaint must contain well-pled facts demonstrating the stockholder's actual control with regard to the particular transaction that is being challenged. This actual control test is not an easy one to satisfy as stockholders with very potent clout have been deemed, in thoughtful decisions, to fall short of the mark.[38]

"Under Delaware corporate law, the court does not start with the assumption that each director was disloyal: rather, 'independent directors are presumed to be motivated to do their duty with fidelity.'"[39] In this case, however, the court is satisfied that the well-pleaded facts in the amended complaint, if proven at trial, amount to actual control by Elliott Management over the American Capital board with respect to the process that led to the sale of American Capital to Ares. In that regard, the plaintiffs have successfully pleaded that Elliott is a controller, thus, at least for now, invoking the benefit of the entire fairness standard of judicial review. This does not mean, of course, that the plaintiffs will win at trial or that the transaction will subject Elliott to a damages award. It means only

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dispute was whether a less than 50% stockholder was a controller. The court concluded that "the cases do not reveal any sort of linear, sliding scale approach whereby a larger share percentage makes it substantially more likely that the court will find the stockholder was a controlling stockholder. Instead, the scatter-plot nature of the holdings highlights the importance and fact-intensive nature of the actual control factor."

[38] *Sciabaucchi v. Liberty Broadband Corp.*, 2017 WL 2352152 (Del. Ch., May 31, 2017).

[39] *In re Cornerstone Therapeutics Inc. Stockholder Litigation*, 115 A.3d at 1183-84 (quoting *In re MFW Shareholders Litigation*, 67 A.3d 496, 528 (Del. Ch. 2013)).

that the amended complaint will not be dismissed. A number of factors figure into the court's decision in this regard.

First, the court is satisfied that the plaintiffs have pleaded a claim that Elliott enjoyed a material economic benefit different from the remaining common stockholders. Elliott received $3 million from American Capital as "reimbursement" for Elliott's expenses in connection with the sales process. No other stockholder, not even another large stockholder, received, like Elliott, any separate monetary consideration.[40]

When the question of why Elliott got $3 million was raised by the court at oral argument, counsel for Elliott responded that such things happen all of the time. However, this court could not locate (and counsel could not cite) a single case, from Delaware or elsewhere, reported or unreported, in which a stockholder in Elliott's position got paid for instigating and then advising on the "sale" of a public company. Surely, if the practice were so common, so accepted, and so routine there would be at least one case on the subject.

Second, as for why a stockholder like Elliott would leave money on the table, the amended complaint adequately clarifies why this was the case. According to the plaintiffs, the "playbook" of entities like Elliott is to show up at a public company, push very hard for a quick sale,[41] and then profit from the bump in the target's stock price as the market came to believe that a deal would get done. Elliott then exited the stock as a result of the sale to Ares. Although it may not need the money, in ordinary terms, this is

[40] Elliott says that this sum is not material. Perhaps not. But if $3 million was not material to Elliott, why did it ask for and accept the payment? That question has not, to date, been answered satisfactorily.

[41] Here, six months from when Elliott first surfaced to the announcement of the sale to Ares.

how funds like Elliott make money. So, although it is not the classic fire sale, such as when a founder has an urgent need for cash, it is still a fire sale for the ordinary common stockholder who otherwise is a long term investor and not looking for a quick profit. At least in this case, the so-called "fire-sale" theory is adequately pleaded.[42]

Third, the court is satisfied the plaintiffs have pleaded sufficient facts that the American Capital board bent to the wishes of Elliott in selling the company to Ares. In other words, sufficient facts are pleaded which, if believed, would show that the board did not act independently, but as Elliott's puppet.[43] The amended complaint is rife with specific facts showing that Elliott dominated the process and favored Ares to the exclusion of at least two other serious bidders (Apollo and HNA), both of which offered a better economic deal to the common stockholder albeit over a somewhat longer horizon. In that regard, this case is unique, as is presents the confluence of better offers and the putative influence of a potent and feared stockholder.

The closest Delaware decision counsel has cited is, ironically, *In re Novell, Inc. Shareholder Litigation*.[44] In that case, the plaintiffs brought a class action against Novell, Inc. (the target), Attachmate Corporation (the acquirer), and Elliott Associates LP. Novell's board had nine members, eight of whom were outside directors at the time the merger was approved. Similar to this case, Elliott filed a Schedule 13D reporting a 7.1% interest in Novell's common stock. Elliott's representatives met with the Novell board to

[42] See *In re Morton's Restaurant Group, Inc. Shareholders Litigation*, 74 A.3d 656, 666-67 (Del. Ch. 2013).

[43] Between December 2015 and June 2016, Elliott's ownership stake in American Capital rose from 10.3% to 15.9%.

[44] 2013 WL 322560 (Del. Ch. Jan. 3, 2013).

discuss Novell's strategic plan. Elliott then made an unsolicited, non-binding proposal to purchase Novell for cash. On that same day, Elliott raised its stake in the company to 8.5%.

After several meetings the Novell board rejected Elliott's proposal, but continued to solicit interest from other potential buyers. Ultimately, Novell was approached by Attachmate as a potential buyer. Attachmate sought permission from Novell to contact Elliott as a potential source for financing a possible transaction with Novell. Novell and Attachmate ultimately entered into a merger agreement, and Elliott contributed to the financing by pledging a portion of its Novell's shares to Attachmate's parent. In exchange, Elliott, unlike other Novell shareholders, received a post-merger equity interest in the parent company. Elliott also obtained a post-merger board seat. The Vice Chancellor concluded in that case that the plaintiffs had stated a colorable claim that the Novell board "treated a serious bidder in a materially different way and that approach might have deprived shareholders of the best offer reasonably available."[45]

In this case, the plaintiffs' amended complaint alleges that on May 2, 2016, HNA submitted a superior bid, $18.50 per share in cash for the whole company. The complaint also alleges that, apart from a single telephone call to an independent director of ACAC and MTGE, the board took no further meaningful steps to be able to negotiate with HNA (or Apollo, which *sua sponte* submitted an increased bid).

In *Novell*, as in this case, the plaintiff alleged that Elliott put the company in play and that they thereafter dominated the process. The Vice Chancellor in *Novell* was not persuaded that the facts pleaded in that case amounted to any plausible breach by the

[45] *In re Novell Shareholder Litigation*, at * 9.

board of its fiduciary duty.[46] Elliott had less than a 10% stake in *Novell* and was not alleged to have had any undue influence on the board. The mere threat of the initiation of a proxy contest in that case, without more, was held insufficient "to establish domination and control, or to create disqualifying interest."[47]

In this case, the facts alleged are quite different than those outlined in *Novell*. The plaintiffs allege that on May 12, 2016, Apollo was willing to pay $17.36 per share, contingent on exclusivity, but American Capital's board told Apollo that it was not interested and did not even attempt to obtain any additional value from Apollo. The next day, May 13, 2016, the board told Ares that it was prepared to move forward. The Ares merger yielded $10.06 in cash and 0.483 shares of stock from Ares. Based on the closing price of Ares stock on May 20, 2016, the implied value of the merger was $17.40 per share, a token increase from Apollo's last bid. Notably, the cash portion of the consideration was $6.41 per share from Ares, $1.20 per share from an Ares affiliate and $2.45 from the Company's sale of the ACMM unit to AGNC. Almost 25% of the cash consideration and 14% of the total consideration came from assets the Company's stockholders already owned. Further, the total consideration was at a substantial discount to the Company's net asset value. Although nominally, the implied value of the total merger consideration yielded an 11% premium over the Company's closing stock price on May 20, 2016, the consideration equals only 81% of the Company's per-share book value as of March 31, 2016. Although the small size of the premium, without more, does

[46] *In re Novell Shareholder Litigation*, at *12.

[47] *Id. See also In re Synthes, Inc. Shareholder Litigation*, 50 A.3d 1022 (Del. Ch. 2012).

not call the transaction into question,[48] the role played by Elliott, the apparent willingness of at least two other buyers (Apollo and HNA) to pay a higher price, and the discount to book value gives credence to the plaintiffs' contentions that the board knew that Ares' bid substantially undervalued the Company, but brushed this concern aside because it was worried about losing a proxy battle to Elliott.

It is clear from the amended complaint that Elliott not only triggered the ultimate sale to Ares, but also had regular, detailed, and intimate knowledge of nearly every facet of the board's decision-making process. If the facts pleaded are true, Elliott had access to the board, its advisors, and all deal information to an exquisite degree, and more so than any other common stockholder who was not a member of the board or American Capital management.[49] The facts pleaded in the amended complaint, and the reasonable inferences that can be drawn from those facts, support the inference that Elliott acted as a *de facto* member of the American Capital board.

There is also the issue that American Capital paid Elliott $3 million for its role in the merger process. American Capital was advised in this case by two blue chip investment banks, Goldman Sachs and Credit Suisse. In addition to their standard fees, the Company's board awarded each bank an additional $2 million in fees. Other than pressure to sell the company, it is not clear what Elliott brought to the table for the common stockholders. Why should the common stockholders of American Capital pay the legal fees of another stockholder, Elliott, for "advising" the Company's board in a merger transaction if that transaction, independently considered (and vetted by two

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[48] *See In re Crimson Exploration Inc. Stockholder Litigation*, at *23-24.

[49] In this case one stockholder, Elliott, had access to vastly more information than any other American Capital stockholder.

investment banks), is the product of rational business judgment? To date, the court has not been provided with a rational answer.

The court concludes that the amended complaint pleads a colorable claim of board domination by Elliott. Just why Elliott preferred Ares is not completely obvious, apart from the fact that Ares was willing and able to do a deal on Elliott's timetable. But the amended complaint is sufficient in this regard to withstand Elliott's motion to dismiss.

According to the Supreme Court of Delaware: "[W]hen a complaint pleads facts creating an inference that seemingly independent directors approved a conflicted transaction for improper reasons, and thus, those directors may have breached their duty of loyalty, the pro-plaintiff inferences that must be drawn on a motion to dismiss counsels for resolution of that question of fact only after discovery."[50] The amended complaint in this case sufficiently pleads that Elliott was a controller with respect to a specific transaction.

Conclusion

The motion of Elliott Management to dismiss for lack of personal jurisdiction is denied. The motion of Elliott Management to dismiss on the ground that the transaction is not subject to entire fairness review is denied. It is SO ORDERED this 12th day of July, 2017.

Ronald B. Rubin, Judge

[50] *In re Cornerstone Therapeutics Inc. Stockholder Litigation*, 115 A.3d at 1187.