IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

IN RE AMERICAN CAPITAL, LTD SHAREHOLDER LITIGATION : : : : Case No. 422598-V

MEMORANDUM AND ORDER

The plaintiffs in this consolidated stockholder class action brought suit on behalf of the common stockholders of American Capital, Ltd. ("American Capital" or the "Company"), and seek to enjoin the mergers among affiliates of the Company and Ares Capital Corporation ("Ares"). The proposed transactions are outlined in a Registration Statement filed on July 20, 2016, with the Securities and Exchange Commission.

The plaintiffs filed suit on June 24, 2016, shortly after the Company announced, on May 23, 2016, that it had entered into a merger agreement with Ares. A Consolidated Amended Class Action Complaint was filed on August 18, 2016. Presently before the court are the defendant's motion for a protective order to stay discovery, the defendant's motion to dismiss, and the plaintiffs' cross-motion for expedited discovery.

The court held a hearing on these motions on September 23, 2016. At the conclusion of the hearing, the court announced a summary of its rulings. The reasoning behind those rulings is set out below. No further hearing is necessary.[1]

Background

American Capital is a Delaware corporation, with its principal offices in Bethesda, Maryland. It is a publically traded global asset manager and a private equity

[1] *Phillips v. Venker*, 316 Md. 212, 219 & n. 2 (1989).

firm. Both directly and through its asset management business, American Capital underwrites and manages 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. Since its IPO, American Capital's stock price plus dividend distributions resulted in an annualized growth rate of 13.6%.

In 2014 and 2015, American Capital's board regularly considered strategic options for the company. For example, 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 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 would 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 spin 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 its preliminary proxy statement on September 20, 2015, pursuant to which it sought stockholder approval of the spin-off. In the 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.

Elliott Management Corporation is a hedge fund management firm, and a major stockholder of American Capital. On November 16, 2015, as the vote on the spin-off neared, Elliott, which at that time held an 8.4% interest in American Capital, issued a press release urging American Capital Stockholders to vote against management's planned spin-off. In that same press release, Elliott disclosed 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 board members and undertake a strategic review. That same day, Elliott filed a proxy statement contesting the vote on the upcoming spin-off, and urged American Capital stockholders to vote against every proposal made by the board, including the appointment of certain directors and the adoption of the company's proposed 2016 equity incentive plan.

The next day, November 17, 2015, representatives of American Capital met with representatives of Elliott. Two days later, American Capital voted to increase the size of its board by one member, to ten, and appointed defendant David G. Richards to fill the newly-created position. American Capital gave Richards a one-time cash award of $100,000 for serving on the board.

On November 23, 2015, Elliott filed an amendment to its Schedule 13D, reporting an increase in its ownership of American Capital to 9.1%. 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. As of this announcement, American Capital was in play.

Ares Capital Corporation 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. The company is externally managed by Ares Capital Management LLC, a subsidiary of Ares Management, L.P.

On January 15, 2016, Ares made an unsolicited offer to purchase American Capital's outstanding stock for $16.00 per share. Four days later, Elliott sent a letter to

the American Capital board expressing its concern over the "slow pace" of the solicitation of offers, and urged the Company to begin discussion with the most promising potential acquirers. Later that same day, American Capital's financial advisers met by telephone with representatives of Elliott. On January 22, 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%.

On February 23, 2016, American Capital decided to invite eleven parties to participate in a second round of due diligence, four of which had expressed an interest in buying the whole company. On March 15, 2016, American Capital requested final bids from the remaining interested parties. On April 8, 2016, Ares's 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, Party 3, 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 18, 2016, Ares and others submitted revised bids.

On April 20, 2016, Elliott signed a confidentiality agreement with American Capital, thereby affording it access to the review process of the American Capital board. 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. On April 27, 2016, Elliott told American Capital that it might become a bidder, but withdrew that suggestion shortly thereafter.

On May 2, 2016, Party 4 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, Party 4 advised that it was not prepared to move forward with American Capital Mortgage Management, LLC ("ACMM") excluded from the transaction, but that it stood by its $18.50 bid for the whole company.

On May 11, 2016, Ares and Elliott signed a confidentiality agreement to grant Elliott access to Ares's 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 Party 3. At the meeting, Elliott expressed "a preliminary preference" for Ares's 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%.

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's 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, 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 wanted the American Capital board to be "reconstituted" if the Ares deal did not close and the chairman removed.

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 had requested. On May 18, 2016, American Capital sent Elliott a revised draft of the requested settlement agreement.

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.

On May 23, 2016, American Capital announced that it, along with Ares and some of its 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 would 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. This separate transaction closed on July 1, 2016.

On June 6, 2016, American Capital's board approved the settlement agreement with Elliott and, on the same day, 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 in favor of management's board nominees at the 2016 annual meeting. Finally, 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 will be used to solicit the votes of American Capital stockholders to support the Ares merger. As noted, Elliott and Ares have agreed that Elliott would vote its shares in favor of the merger.

Discussion

Although American Capital's principal office is in Maryland, it is a Delaware corporation and, therefore, Delaware substantive law governs. However, while Delaware substantive law governs this case, Maryland procedural law still controls the litigation process. Under Md. Rule 2-401, unless the court orders otherwise, "methods of discovery may be used in any sequence." Unlike under the Federal Rules or the rules of some states, there is no automatic stay of discovery in Maryland pending some particular event, such as a decision on a motion to dismiss, absent the entry of a protective order under Md. Rule 2-403.[2] Whether to allow discovery to proceed in a particular case, preclude it altogether, or allow it to a limited extent is a discretionary decision based

[2] P. Niemeyer, L. Schuett & J. Smithey, MARYLAND RULES COMMENTARY 366 (4th ed. 2014).

largely on the particular facts and circumstances of the case before the court, including the procedural posture of the case.[3]

Given the paucity of reported Maryland appellate decisions, Delaware case law regarding early-stage discovery in merger litigation is instructive. Under Delaware's regime, expedited discovery may be allowed if "the plaintiff has articulated a sufficiently colorable claim and shown a sufficient possibility of a threatened irreparable injury, as would justify imposing on the defendants and the public the extra (and sometimes substantial) costs of an expedited preliminary injunction proceeding."[4] Another factor to be weighed is the type of claim advanced. In cases involving alleged disclosure violations—such as an allegedly misleading proxy statement, whether misleading by misstatement or omission—if the violations likely are material, the better course is for the court to consider them before rather than after the stockholder vote.[5] In other words, assuming that sufficient facts have been pleaded to articulate colorable claims for preliminary injunctive relief, limited discovery at least should be permitted in most cases before the stockholder vote.

In considering whether colorable claims for relief have been pleaded 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

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[3] *See In Re American Realty Capital Trust, Inc*., 2012 WL 7153023 (Md. Cir. Ct., Dec. 13, 2012) (collecting cases); *see also Bacon v. Arey*, 203 Md. App. 606, 671-73 (2012).

[4] *In re K-Sea Transportation Partners L.P. Unitholders Litigation*, 2011 WL 2410395 (Del Ch. June 10, 2011) (quoting *Giammargo v. Snapple Beverage Corp*., 1994 WL 672698 (Del Ch. Nov. 15, 1994)).

[5] *In re Staples, Inc. Shareholder Litigation*, 792 A.2d 934, 960 (Del. Ch. 2001).

proper only if the alleged facts fail to state a cause of action."[6] In making its decision, "the court must view all well-pleaded facts and the inferences from those facts in a light most favorable to the plaintiff."[7] The court credits facts pleaded in the complaint and reasonable inferences from those facts but not "conclusory charges that are not factual allegations."[8] Ordinarily, dismissal is proper "only if the alleged facts and permissible inferences, so viewed, would, if proven, nonetheless fail to afford relief to the plaintiff." [9]

Under Maryland Rule 2-303(b), a complaint must state those facts "necessary to show the pleader's entitlement to relief." Unlike under Rule 8(a) of the Federal Rules of Civil Procedure, Maryland retains vestiges of code pleading in that a plaintiff must allege sufficient facts to constitute a cause of action.[10] Consequently, "a pleading that fails to allege facts, or that fails to demand a particular form of relief, fails to fulfill the purposes of pleading."[11]

Whether to grant a motion to dismiss "depends solely on the adequacy of the plaintiff's complaint."[12] The court will, however, consider all of the documents referred to in the complaint and take cognizance of the extent to which, if any, of their terms are

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

[7] *Lloyd v. General Motors Corp*., 397 Md. 108, 122 (2007); *see also Hrehorovich v. Harbor Hosp. Ctr., Inc*., 93 Md. App. 772, 781 (1992).

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

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

[10] *Ver Brycke v. Ver Brycke*, 379 Md. 669, 696-97 (2004); *Scott v. Jenkins,* 345 Md. 21, 27-28 (1997).

[11] P. NIEMEYER , ET AL., MARYLAND RULES COMMENTARY at 238.

[12] *Green v. H & R Block, Inc*., 355 Md. 488, 501 (1999).

inconsistent with the complaint's allegations.[13] Maryland simply does not read into the complaint documents that are neither specifically referred to nor incorporated into the complaint by reference.[14]

The Parties' 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 unfair merger price; and (3) disclosure violations. All of the claims in the amended complaint attempt to plead variants of the breach of the duty of loyalty. If the merger closes, all duty of care claims would likely be eliminated by the Company's charter exculpation provisions.[15]

In the plaintiffs' view, the proposed transaction is 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 did an about-face in response to pressure from Elliott—not only promptly retracting its own ideas for maximizing value but then immediately caving in to 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 having a "compensation

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[13] *See Frederick v. Corcoran*, 2013 WL 10069700 (Md. Cir. Ct., Aug. 15, 2013).

[14] Md. Rule 2-303(d).

[15] *See In re Cornerstone Therapeutics Inc., Stockholder Litigation*, 115 A.3d 1173, 1175-76 (Del. 2015).

[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, and to sell quickly, or else be ousted by Elliott in a proxy fight.

The defendants argue that an independent board carefully evaluated proposals from eighteen bidders out of the 136 parties that were solicited by its financial advisers. They contend that the board "was able to extract a premium strategic transaction with Ares that was the best value reasonably available to the stockholders."[16] The defendants also posit that since only one director, Malon Wilkus, had any unvested stock, amounting to only a small fraction of his total holdings, the plaintiffs have failed to plead a colorable claim of director interest. At most, the defendant's argue, American Capital's actions were simply a response to a significant stockholder, and not the abdication of its fiduciary responsibilities to maximize stockholder value under *Revlon*.[17] The defendants also contend that the plaintiffs have failed to allege that Elliott had any financial interest different from that of the other holders of common stock.

Finally, the defendants contend that the 1,000-plus page registration statement discloses all material facts, is not misleading in any way, and that no further disclosures are necessary. They stress, as well, that the board's process was thorough and transparent, and that all serious offers were carefully considered. As to the actual process employed by the American Capital board, the defendants urge that they complied with all of their fiduciary duties, including the singular *Revlon* duty, which is to get the best price

[16] Defendants' Omnibus Memorandum of Law at p. 2.

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

reasonably available to the stockholders.[18] The court is also reminded that "[n]o court can tell directors exactly how to accomplish that goal, because they will be facing a unique combination of circumstances, many of which will be outside their control."[19]

Alleged Flawed Process and Unfair Price

Ordinarily, "[a] director is considered interested when he will receive a personal financial benefit from a transaction that is not equally shared by the stockholders."[20] In most cases, the vesting and acceleration of options in connection with a merger, which were previously awarded under an established compensation plan, does not confer such a special benefit on the directors.[21] Under certain circumstances, however, if the value of the directors' unvested stock options greatly outweighs the value of their unrestricted holdings, a colorable claim may be presented that the director's receipt of special benefits, by way of acceleration, may have tainted their independence.[22]

Apart from defendant Wilkus, no other non-officer director had any unvested equity. In point of fact, all of the remaining directors' stock options and other equity compensation had fully vested. From this vantage point, the plaintiffs' have failed to allege a colorable claim of director interest.

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[18] *Id.* at 182. It is not altogether certain that *Revlon* actually applies to this case. *See Arnold v. Society for Savings Bancorp., Inc*., 650 A.2d 1270, 1289-90 (1994); *In Re Synthes, Inc. Shareholders Litigation,* 50 A.3d 1022, 1047-48 (Del. Ch. 2012).

[19] *Lyondell Chemical Co. v. Ryan*, 970 A.2 235, 242 (Del. 2009).

[20] *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

[21] *In re Toys "R" Us, Inc. Shareholder Litigation*, 877 A.2d 975, 1006 (Del. Ch. 2005).

[22] *See In Re K-Sea Transportation Partners L.P.*, 2011 WL 2410395 (Del. Ch. June 10, 2011).

With respect to Wilkus, he has no unvested options and his unvested stock awards of 416,451 shares are worth approximately $5.7 million. It is true that his total "departure package" of $74.6 million is large. However, the unvested piece of his pay-out is a very small percentage of his overall holdings, and Wilkus would receive the bulk of his pay-out even following a successful proxy contest. Moreover, the value of his unvested equity is offset by any hypothetical severance payment and is dwarfed by the size of his holdings. As a consequence, there are no colorable allegations in the amended complaint that support a rational inference that Wilkus acted largely, or at all, to protect his unvested equity in voting for the Ares transaction.

In any event, the plaintiffs have not alleged that any of the nine other directors were interested, within the classic meaning of Delaware law, or otherwise beholden to Wilkus. Each director is entitled to separate consideration when his or her actions are challenged, and "under Delaware corporate law, that individualized consideration 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.'"[23] Apart, perhaps, from the question regarding the influence of Elliott on the board's decision-making, which is discussed below, the amended complaint fails to state a cognizable claim of director interest.

The plaintiffs have also failed to plead a claim that Elliott enjoyed some economic benefit different from the remaining common stockholders. The Amended Complaint vaguely references "an analysis by Bloomberg," to the effect that Elliott will realize a

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[23] *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).

20% annualized return on its "brief" investment in American Capital.[24] The amended complaint does not detail the factual basis for this contention, or how Elliott's return might differ from that of any other common stockholder when viewed over the same time period. Further, no facts are set out that would support a rational inference that Elliott had some motive to push a transaction in which it would not fare the same as any other stockholder.[25] Accordingly, the so-called "fire-sale" theory is not adequately pleaded in this case.

The real thrust of the plaintiffs' claim in this case, as pleaded, is the board's alleged undue deference to the wishes of Elliott, such that the board did not act independently, but as Elliott's puppet.[26] According to the plaintiffs, Elliott dominated the process and favored Ares over at least two other serious bidders, both of which, it is alleged, offered a potentially better economic deal to the common stockholder. In that regard, this case is unique, as is presents the confluence of potentially better offers and the putative influence of a major (but not controlling) stockholder.[27] Nonetheless, it is still not entirely clear as to why Elliott would prefer to receive less money per share of stock by favoring Ares if there were a better financial or strategic transaction that could actually close.

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[24] Amended Complaint at ¶ 82.

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

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

[27] Elliott is not a controlling stockholder, as that term is used in Delaware jurisprudence. *See In Re Crimson Exploration Inc. Stockholder Litigation*, 2014 WL 5449419 (Del. Ch. Oct. 24, 2014).

The closest decision counsel has cited is *In re Novell, Inc. Shareholder Litigation*.[28] 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 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."[29] In this case, the plaintiffs' amended complaint alleges that on May 2, 2016,

[28] 2013 WL 322560 (Del. Ch. Jan. 3, 2013).

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

Party 4 submitted a superior bid, \$18.50 per share in cash for the whole company.[30] The complaint also alleges that, apart from a single telephone call to an independent director of American Capital Asset Management, LLC ("ACAC") and American Capital Mortgage Investment Group ("MTGE"), the board took no further meaningful steps to be able to negotiate with Party 4.[31]

In *Novell*, as in this case, the plaintiffs alleged that Elliott put the company in play and that they thereafter dominated the process. If that is true, what legally does that mean? In *Novell*, not much, apparently. The Vice Chancellor was not persuaded that the facts pleaded in that case amounted to any plausible breach by the board of its fiduciary duty.[32] 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."[33]

In this case, the facts alleged are quite different than those outlined in *Novell*. The plaintiffs allege that on May 12, 2016, Party 3 was willing to pay \$17.36 per share, contingent on exclusivity, but that American Capital's board told Party 3 that it was not interested. The next day, May 13, 2016, the board told Ares that it was prepared to move forward. The Ares merger would yield \$14.95 in cash and stock from Ares, plus the return of \$2.45 to the stockholders from American Capital's sale of ACMM. At best, the

[30] Amended Complaint at ¶ 65.

[31] Amended Complaint at ¶ 66.

[32] *Novell*, at *12.

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

Ares merger would produce a total price of $17.40 in cash and stock for the common stockholder, which is at a healthy discount to the Company's net asset value. Almost 25% of the cash consideration, and 14% of the total consideration, are comprised of assets that American Capital stockholders already own. Although nominally, the implied value of the total merger consideration yields 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.[34] Although the small size of the premium, without more, does not call the transaction into question,[35] the role played by Elliott, the apparent willingness of at least two other buyers to pay a higher price, and the discount to book value, gives the court pause.

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, and 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.[36] 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. And, to top it off, American Capital

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[34] Amended Complaint at ¶¶ 89-91, 96.

[35] *See In re Crimson Exploration Inc. Stockholder Litigation*, 2014 WL 5449419 at *23-24 (Del. Ch. October 24, 2014).

[36] In this case, one stockholder, Elliott, seems to have had access to vastly more information than American Capital has shared with other holders of its common stock. Thus, Elliott was, and is, more "informed" than any other American Capital stockholder, except, perhaps, for Party 1, which signed a confidentiality agreement in connection with the bidding process.

paid Elliott $3 million for its role in the merger process. Why should the stockholders of American Capital pay the legal fees of another stockholder, Elliott, for "advising" the board in a merger transaction if that transaction, independently considered, is the product of business judgment?[37] Although the matter is not free from doubt, the court concludes that the amended complaint pleads a colorable claim of board domination by Elliott. Just why Elliott preferred Ares, is not obvious from the proxy statement. There may be good reasons for this preference and the board's ultimate choice, but the amended complaint is sufficient in this regard to withstand a motion to dismiss.

<u>Disclosure Claims</u>

"Delaware law requires a full and fair explanation of the rationale for a proposal that directors are recommending stockholders to approve. The Board is required to disclose its motivations candidly, a proposition that 'hardly needs citation.'"[38] Under Delaware law, "[c]orporate fiduciaries can breach their duty of disclosure . . . by making a materially false statement, by omitting a material fact, or by making a partial disclosure that is materially misleading."[39] Whether the disclosures in a registration statement are adequate "is a mixed [question] of law and fact, requiring an assessment of the inferences a reasonable shareholder would draw and the significance of those inferences to the individual shareholder."[40] The plaintiffs bear the burden of demonstrating materiality.

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[37] American Capital was advised by Goldman Sachs and Credit Suisse, as well as Skadden Arps.

[38] *ODS Technologies, L.P. v. Marshall*, 832 A.2d 1254, 1261 (Del. Ch. 2003) (footnotes omitted) (quoting *Highland Capital, Inc. v. Longview Fibre Co.*, 1990 WL 3973, at *5 (Del. Ch. Jan. 22, 1990)).

[39] *Pfeffer v. Redstone*, 965 A.2d 676, 684 (Del. 2009).

[40] *Shell Petroleum, Inc. v. Smith*, 606 A.2d 112, 114 (Del. 1992).

As the Delaware Supreme Court has summarized, "[t]o state a disclosure claim, [plaintiffs] 'must provide some basis for a court to infer that the alleged violations were material . . . . They must allege the facts missing from the [proxy] statement, identify those facts, and state why they meet the materiality standard and how the omission caused injury.'"[41] Importantly, a proxy statement should not make a stockholder hunt for snippets of material information, and then weave them together into a coherent disclosure. A failure to properly disclose material information "is not cured by reason that it could be uncovered by an energetic shareholder reading an SEC filing."[42]

Only a few of the plaintiffs' disclosure claims bear mention at this juncture. The plaintiffs suggest that Elliott "may have" traded on inside information as it built up its position in American Capital stock.[43] This bald assertion, without more, is not sufficient to state a disclosure claim. Elliott's positions are fully disclosed in its Form 13-Ds filed with the Securities and Exchange Commission. This same information, and the timing of changes in Elliott's positions, also is fully disclosed in the Registration Statement. No facts are pled that (1) Elliott actually increased the number of shares it held from January 22, 2016, until after the Ares transaction was announced, or (2) that Elliott executed any trades during a time when it was in possession of non-public information.[44]

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[41] *Skeen v. Jo-Ann Stores, Inc*., 750 A.2d 1170, 1173 Del. 2000) (quoting *Louden v. Archer-Daniels-Midland Co*., 700 A.2d 135, 142 (Del. 1997)).

[42] *ODS Technologies, L.P.*, 832 A.2d at 1262.

[43] Amended Complaint at ¶ 109.

[44] Insider trading is, of course, illegal. *Securities and Exchange Commission v. Texas Gulf Sulpher Co*., 401 F.2d 833 (2d Cir. 1968) (en banc), *cert. denied*, 394 U.S. 976 (1969).

The plaintiffs also seek more information about so-called "don't ask, don't waive" provisions in non-disclosure agreements bidders were required to sign.[45] According to the plaintiffs, these specialized aspects of the standstill agreements generally prohibit the counterparties from making an unsolicited offer to acquire or merge with the target company, and even may prohibit them from requesting a waiver of their respective standstill agreements to allow the submission of a higher offer. The plaintiffs also posit that the board may have agreed to a provision in the merger agreement that prohibits the Company from releasing, waiving, or failing to enforce any of these "don't ask, don't waive" provisions. The effect, in the plaintiffs' view, is to prevent the submission of topping bids, thereby depriving the stockholders of the ability to receive a superior offer for their stock.

Delaware law is scant on the propriety of these types of deal protection devices. In the sole case brought to the court's attention, then-Chancellor Strine ruled that although such provisions were not improper per se, there might be circumstances under which they could be found inequitable.[46] In this case, however, the court need not venture into this thicket. The Registration Statement is clear that none of the confidentiality agreements has "don't ask, don't waive" provisions. American Capital, under the merger agreement, may waive or terminate any standstill agreement to allow the submission of a competing proposal. In short, there is nothing further to disclose in this regard.

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[45] Amended Complaint at ¶111.

[46] *In re Ancestry.com Inc. Shareholder Litigation*, C.A. No. 7988-CS (Del. Ch. Dec. 17, 2012).

The plaintiffs also seek disclosure of the specific amounts bid by the eleven parties which offered to acquire all or part of the company. [47] They say this information is material because the Board partially disclosed information about eleven bids, but failed to advise the stockholders about the price, or price ranges, these bidders offered. The defendants contend that this information is not material, as it is merely indications of interest, and that all actual bids were disclosed in the Registration Statement. The court agrees that the nominal values of mere indications of interest ordinarily are not material.[48] However, the bids of Party 4 and Party 3 are sufficiently close to being firm offers that more fulsome disclosure is appropriate.

The plaintiffs also complain that the Registration Statement omits key valuation metrics. The plaintiffs seek disclosure of the details of the selected companies analysis performed by Credit Suisse and the select transaction analysis performed by Goldman Sachs. They do not say why they need this information in deciding on whether to vote for or against the Ares merger. They simply say that it must be significant since the bankers did it. The court does not agree.

Of course, stockholders are entitled to a fair summary of the work performed by an investment advisor for the company on whose advice the board relied in reaching a merger decision.[49] A fair summary does not require the disclosure in a registration statement or a proxy statement of everything the investment bankers did if, ultimately,

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[47] Amended Complaint at ¶110.

[48] *David P. Simonetti Rollover IRA v. Margolis*, 2008 WL 5048692 at *12 (Del. Ch. June 27, 2008).

[49] *In re Pure Resources Shareholders Litigation*, 808 A.2d 421, 449 (Del. Ch. 2002).

neither the banker nor the board relied on that particular model in forming an opinion or reaching a decision. It is clear from reading the Registration Statement that the financial analyses presented to and relied on by the board are disclosed and fairly presented. Why one financial advisor chose to rely on one type of analysis, and another financial advisor performed its work in some other fashion, without more, does not show that something is missing from the Registration Statement, much less that it is material.[50] Nothing further is required in this case.[51]

The plaintiffs also seek the disclosure of Ares's stand-alone analysis, which was performed by its investment bankers.[52] But Ares's analysis (or those of its bankers, Wells Fargo and Merrill Lynch) of how it would fare, absent the merger, is not relevant to a stockholder of American Capital. If the merger does not close, American Capital stockholders will not own any interest in Ares. If it does close, there will be a combined company, not a stand-alone company. Ares is the acquiror, not the target. Based on the amended complaint, and the structure of this transaction, the court does not apprehend why Ares's stand-alone information is material to a stockholder of American Capital.

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[50] The selected company analysis performed by Credit Suisse is described on pp. 163-64 of the Registration Statement. The selected transaction analysis performed by Goldman Sachs is found on p. 156.

[51] *In re Trulia, Inc. Stockholders Litigation*, 129 A.3d 884, 900-07 (Del. Ch. 2016) (discussing dubious value of many "supplemental" disclosures).

[52] Amended Complaint at ¶ 114.

Conclusion

The defendants' motion to dismiss is denied. The defendants' motion for a protective order and to stay discovery is denied, in part. It is SO ORDERED this ____ day of October, 2016.

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Ronald B. Rubin, Judge