
IN RE AMERICAN CAPITAL, LTD.
SHAREHOLDER LITIGATION

:
: **IN THE**
:
: **CIRCUIT COURT**
:
: **FOR MONTGOMERY COUNTY**
:
: Case No. 422598-V
:
: Judge Ronald Rubin
:

ORDER AND FINAL JUDGMENT

A hearing having been held before this Court on February 16, 2018, pursuant to the Court's Order of Preliminary Approval and for Notice and Scheduling, dated November 28, 2017 (the "Order"), upon the Amended Stipulation and Agreement of Compromise, Settlement and Release, dated November 17, 2017 (the "Stipulation"), which Order and Stipulation are incorporated herein by reference, of the above-captioned class action (the "Action"), and the settlement contemplated thereby (the "Settlement"), which Stipulation was entered into between Plaintiffs Larry Sutton, Renee J. Bercury, Renee J. Bercury IRA, William T. Bercury, William T. Bercury IRA, Atha P. Bercury, John G. Bercury, Bercury Homes, Ltd., Garry Tischler, and Paul Barba ("Plaintiffs") and certain defendants, namely former directors and officers of American Capital, Ltd. ("American Capital" or the "Company") Malon Wilkus, Neil M. Hahl, Philip R. Harper, Stan Lundine, Alvin N. Puryear, Mary C. Baskin, Kenneth D. Peterson, Jr., Susan K. Nestegard, Kristin L. Manos, David G. Richards, John Erickson, and Samuel Flax (collectively, the "American Capital Defendants"), and Elliott Management Corporation, Elliott Associates, L.P., Elliott International, L.P., and Elliott International Capital Advisors Inc. (collectively, the "Elliott Defendants," and collectively with the American Capital Defendants, the "Defendants," and together with Plaintiffs, the "Parties") all by and through their undersigned attorneys; and the

Circuit Court for Montgomery County, Maryland (the "Court") having determined that notice of said hearing was given to the Class in accordance with the Order and that said notice was adequate and sufficient; and the Parties having appeared by their attorneys of record; and the attorneys for the respective Parties having been heard in support of the Settlement of the Action, and an opportunity to be heard having been given to all other persons desiring to be heard as provided in the notice; and the entire matter of the Settlement having been considered by the Court;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, this 16th day of Feb., 2018, as follows:

1. Unless otherwise defined herein, all defined terms shall have the meanings as set forth in the Stipulation.

2. The Notice of Pendency of Class Action, Proposed Settlement and Settlement Hearing ("Notice") has been given to the Class (as defined herein) pursuant to and in the manner directed by the Order, proof of the dissemination of the Notice has been filed with the Court, and a full opportunity to be heard has been offered to all parties to the Action, the Class, and persons in interest. The form and manner of the Notice is hereby determined to have been the best notice practicable under the circumstances and to have been given in full compliance with each of the requirements of Rule 2-231(e) and 2-231(h) of the Maryland Rules, due process, and applicable law, and it is further determined that all members of the Class are bound by the Order and Final Judgment herein.

3. Based on the record in the Action, the Court hereby finds, pursuant to Rule 2-231 of the Maryland Rules, as follows:

a. (i) the Class (as defined below) is so numerous that joinder of all members is impracticable. As of May 23, 2016, the date of the announcement of the Transactions described in the Definitive Proxy Statement filed with the U.S. Securities and Exchange Commission (the "SEC") on October 18, 2016, approximately 229.3 million shares of American Capital common stock were outstanding, held, or owned by thousands of beneficial owners that comprise the Class; (ii) there are questions of law and fact common to the Class, including whether the Elliott Defendants had any fiduciary duties or statutory duties to the Class in connection with the Transactions, and whether the Defendants breached their fiduciary or statutory duties, to the extent such duties existed, to the Class in connection with the Transactions; (iii) Plaintiffs' claims are typical of the claims of absent members of the Class in that they arise in connection with the same Transactions and are based on the same legal theories; (iv) Plaintiffs and Plaintiffs' Co-Lead Counsel have fairly and adequately protected the interests of the Class; (v) the prosecution of separate actions by individual members of the Class would create a risk of inconsistent and varying adjudications which would establish incompatible standards of conduct for the Defendants; (vi) as a practical matter, the disposition of this Action will influence the disposition of any pending or future identical cases brought by absent members of the Class; and (vii) there were allegations that the Defendants acted or refused to act on grounds generally applicable to the Class;

b. the requirements of Rule 2-231 of the Maryland Rules have been satisfied, and the Action has been properly maintained according to the provisions of Rules 2-231(a), 2-231(b)(1), and 2-231(b)(2) of the Maryland Rules;

c. the Action is hereby finally certified as a non-opt out class action pursuant to Rules 2-231(a), 2-231(b)(1), and 2-231(b)(2) of the Maryland Rules and the non-opt out class

is defined as any and all record and beneficial holders of American Capital common stock, their respective successors in interest, successors, predecessors in interest, predecessors, representatives, trustees, executors, administrators, heirs, assigns, or transferees, immediate and remote, and any person or entity acting for or on behalf of, or claiming under, any of them, and each of them, together with their predecessors and successors and assigns, who owned or held shares of American Capital common stock at any time between and including November 16, 2015 and the consummation of the merger on January 3, 2017, excluding all Defendants in the Action or their immediate family members, heirs and assigns, and any entities they control (the "Class"). The record date for determining the stockholders entitled to receive payment from the Fund, which payment shall be made in accordance with the terms and conditions set forth in the Stipulation, was established as the close of business on January 3, 2017. The administration of the settlement Fund shall be accomplished pursuant to a Plan of Allocation to be presented to the Court for its approval no later than ten (10) business after the Court enters this Order and Final Judgment; and

d. Plaintiffs are hereby certified as the Class representatives, and Plaintiffs' counsel are hereby appointed as counsel for the Class. Monteverde & Associates PC, Kahn Swick & Foti, LLC, and Pomerantz LLP are appointed as co-lead counsel for the Class, and Brower Piven, A Professional Corporation, is appointed as liaison counsel for the Class.

4. The Settlement is found to be fair, reasonable, adequate, and in the best interests of the Class, and it is hereby approved pursuant to Rules 2-231(h) and 2-231(i) of the Maryland Rules. The Parties are hereby authorized and directed to comply with and to consummate the Settlement in accordance with its terms and provisions, and the Clerk is directed to enter and docket this Order and Final Judgment in the Action.

5. This Court has jurisdiction over the subject matter of the Action, including all matters necessary to effectuate the Settlement and this Order and Final Judgment.

6. This Order and Final Judgment shall not constitute any evidence or admission by any of the Parties that any acts of wrongdoing have been committed by any of the Parties and should not be deemed to create any inference that there is any liability therefor.

7. The Action is hereby dismissed (i) with prejudice in its entirety as to the Defendants and against Plaintiffs and all other members of the Class on the merits, and (ii) without costs (except as specifically provided below).

8. Any and all manner of claims (including Unknown Claims (as defined herein)), demands, rights, actions, causes of action, liabilities, damages, losses, obligations, judgments, duties, suits, costs, debts, expenses, interest, penalties, sanctions, fees, attorneys' fees, matters, and issues and controversies of any kind whatsoever, whether known or unknown, contingent or absolute, suspected or unsuspected, disclosed or undisclosed, liquidated or unliquidated, matured or unmatured, accrued or unaccrued, apparent or unapparent, that have been, could have been, or in the future can or might be asserted in any court, tribunal, or proceeding (including but not limited to any claims arising under federal, state, foreign, or common law, including the federal securities laws and any state disclosure law), by or on behalf of Plaintiffs or any member of the Class in their capacity as American Capital stockholders, whether individual, direct, class, derivative, representative, legal, equitable, or any other type or in any other capacity (collectively, the "Releasing Persons") against the American Capital Defendants, the Elliott Defendants, and former defendants American Capital, ACAM, ACMM, AGNC, Ares Capital, Orion, IHAM LP, IHAM GP, Ares Capital Management, LLC, and Ares Management, L.P., or any of their families, parent entities, controlling persons, associates, affiliates or subsidiaries and

each and all of their respective past or present officers, directors, stockholders, principals, representatives, employees, employers, attorneys, financial or investment advisors, consultants, accountants, investment bankers, insurers, commercial bankers, entities providing fairness opinions, advisors or agents, heirs, executors, trustees, general or limited partners or partnerships, limited liability companies, members, joint ventures, personal or legal representatives, estates, administrators, predecessors, successors, or assigns, whether or not each or all of the foregoing persons were named, served with process, or appeared in the Action (collectively, the “Released Persons”), which the Releasing Persons ever had, now have, or may have had by reason of, arising out of, relating to, or in connection with the acts, events, facts, matters, transactions, occurrences, statements or representations, or any other matter whatsoever set forth in or otherwise related, directly or indirectly, to the allegations brought in the Action, allegations that could have been brought in the Action (to the extent such allegations relate to the ownership of American Capital securities), the complaints, the Merger Agreement and other transactions contemplated therein, or disclosures made in connection therewith (including the adequacy and completeness of such disclosures) (the “Settled Claims”), are hereby dismissed with prejudice, barred, settled, and released; provided, however, that the Settled Claims shall not include properly perfected claims for appraisal pursuant to 8 *Del. C.* § 262, or claims to enforce the Settlement. The term “Settled Claims” also includes all Unknown Claims described below.

9. The release contemplated by this Order and Final Judgment extends to claims that Plaintiffs or any member of the Class do not know or suspect to exist in his, her, or its favor at the time of the release of the Settled Claims as against the Released Persons, including without limitation those which, if known, might have affected the decision to enter into the Settlement (“Unknown Claims”). The Releasing Persons and Plaintiffs acknowledge, and the members of

the Class by operation of this Order and Final Judgment is deemed to have acknowledged, that they may discover facts in addition to or different from those they now know or believe to be true with respect to the Settled Claims, but that it is the Released Persons' and Plaintiffs' intention and, by operation of this Order and Final Judgment, the intention of the members of the Class, to completely, fully, finally, and forever compromise, settle, release, discharge, extinguish, and dismiss any and all Settled Claims, known or unknown, suspected or unsuspected, contingent or absolute, accrued or unaccrued, apparent or unapparent, which now exist, or heretofore existed, or may hereafter exist, and without regard to the subsequent discovery of additional or different facts. Plaintiffs have, and the Releasing Persons and each member of the Class shall be deemed to have, and by operation of this Order and Final Judgment have, waived, relinquished, and released, the provisions, rights, and benefits of any state, federal, or foreign law or principle of common law, which may have the effect of limiting the release set forth herein. This release shall include a waiver by Plaintiffs, the Releasing Persons, and the Class of any rights pursuant to section 1542 of the California Civil Code (or any similar, comparable, or equivalent provision of any federal, state, or foreign law, or principle of common law), which provides:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS, HER, OR ITS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM, HER, OR IT MUST HAVE MATERIALLY AFFECTED HIS, HER, OR ITS SETTLEMENT WITH THE DEBTOR.

Plaintiffs acknowledge, and the Releasing Persons and each member of the Class shall be deemed by operation of this Order and Final Judgment approving the Settlement to have acknowledged, that the foregoing waiver was separately bargained for, is an integral element of

the Settlement, and was relied upon by each and all of the Defendants in entering into the Settlement.

10. Plaintiffs, the Releasing Persons, and each and every member of the Class, and their respective representatives, trustees, successors, heirs, and assigns, individually and collectively, are hereby permanently barred and enjoined from asserting, commencing, prosecuting, assisting, instigating, continuing, or in any way participating in the commencement or prosecution of any action, whether directly, representatively, derivatively, or in any other capacity, asserting any claims that are, or relate in any way to, the Settled Claims that are released pursuant to this Order and Final Judgment or under the Stipulation against Defendants or any of the Released Persons, and the Unknown Claims, except that this release shall not apply to the rights and obligations created by the Stipulation.

11. Defendants shall be deemed to have, and by operation of this Order and Final Judgment shall have, fully, finally, and forever released, relinquished, settled, extinguished, dismissed with prejudice, and discharged Plaintiffs and Plaintiffs' counsel from any and all claims that have been or could have been asserted in the Action or any forum, which arise out of or relate in any way to the institution, prosecution, settlement, or dismissal of the Action, including any claims of bad faith or abuse of process against Plaintiffs or Plaintiffs' counsel relating to their prosecution of the Action, except that this release shall not apply to the rights and obligations created by the Stipulation. Furthermore, each of the Released Persons shall be deemed to have, and by operation of the Order and Final Judgment shall have, fully, finally, and forever released, relinquished, and discharged Plaintiffs, the Class, and counsel to the Plaintiffs from all claims, demands, rights, actions or causes of action, liabilities, damages, losses, obligations, judgments, suits, fees, expenses, costs, matters and issues of any kind or nature

whatsoever, based upon or arising out of the institution, prosecution, assertion, settlement or resolution of the Action or the Settled Claims or the administration or distribution of the Fund. Moreover, the Class shall be deemed to have, and by operation of the Order and Final Judgment shall have, fully, finally, and forever released, relinquished, and discharged Plaintiffs and counsel to the Plaintiffs from all claims, demands, rights, actions or causes of action, liabilities, damages, losses, obligations, judgments, suits, fees, expenses, costs, matters and issues of any kind or nature whatsoever, based upon or arising out of the institution, prosecution, assertion, settlement or resolution of the Action or the Settled Claims or the administration or distribution of the Fund. Provided, however, that such release shall not affect any claims to enforce the terms of the Stipulation or the Settlement.

12. Plaintiffs' co-lead counsel are hereby awarded attorneys' fees and reimbursement of expenses in the aggregate amount of \$5,895,270.03, inclusive of expenses, which amount the Court finds to be fair and reasonable and which shall be paid out of the Fund in accordance with the terms of the Stipulation and per the instructions of Plaintiffs' co-lead counsel. Plaintiffs are hereby awarded incentive awards in the aggregate amount of \$25,000.00, which amount the Court finds to be fair and reasonable and which shall be paid out of the Fund in accordance with the terms of the Stipulation and per the instructions of Plaintiffs' co-lead counsel.

13. Any and all judgments (other than this Order and Final Judgment against the American Capital Defendants and the Elliott Defendants in connection with the Settled Claims) against any person or entity will be reduced by the amount of the American Capital Settlement Consideration and the Elliott Settlement Consideration (as defined in the Stipulation) paid on behalf of Defendants into the Fund or to the extent of the pro rata share of the American Capital Defendants and the Elliott Defendants if their pro rata share is greater than the American Capital

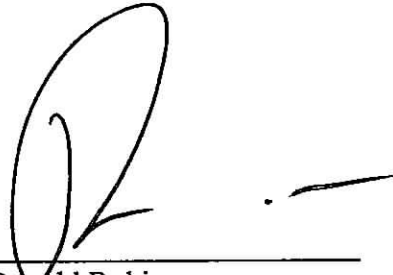
Settlement Consideration and the Elliott Settlement Consideration, respectively. By operation of this Order and Final Judgment, total damages recoverable against any and all other alleged joint tortfeasors (other than the American Capital Defendants and the Elliott Defendants) in the Action or any future action shall be reduced to the extent of the pro rata share of the Released Persons. This provision is intended to relieve and protect the Released Persons from any liability for contribution to any person or entity. Solely for purposes of determining the amount of any judgments that may be recovered against any person or entity pursuant to the Maryland Uniform Contribution Among Joint Tortfeasors Act, (a) the American Capital Defendants and the Elliott Defendants shall each be considered a single joint tortfeasor to the same extent and effect as if judgments had been rendered against each of them as joint tortfeasors; and (b) because of the alleged singular collective conduct of the American Capital Defendants and the alleged singular conduct of the Elliott Defendants, the American Capital Defendants and the Elliott Defendants shall each be treated as a single joint tortfeasor to the fullest extent permitted by Maryland law. Nothing in this Order and Final Judgment shall affect Plaintiffs' recovery against any person or entity other than the Released Persons if such person or entity is adjudicated to be the sole tortfeasor or tortfeasors in this Action or another action. For the avoidance of doubt, nothing in this paragraph shall be construed to reduce in any way the amounts of the American Capital Fund, the American Capital Settlement Consideration, the Elliott Fund, or the Elliott Settlement Consideration (as defined in the Stipulation).

14. Any and all other alleged joint tortfeasors are hereby permanently barred and enjoined from asserting, commencing, prosecuting, assisting, instigating, continuing, or in any way participating in the commencement or prosecution of any claim or action for contribution (whether denominated as contribution, indemnification, or otherwise) against the Released

Persons. In accordance with the terms and conditions of the Stipulation, Plaintiffs and Plaintiffs' counsel agree not to settle any claim arising out of the Settled Claims with any person or entity—other than Defendants—in this Action or any future action absent assurance from such person or entity that he, she, or it shall not seek indemnification or contribution for such settlement directly or indirectly from the Released Persons, including provisions in any resulting settlement agreement that: (i) the settling person or entity shall not seek indemnification or contribution for such settlement directly or indirectly from the Released Persons; (ii) in the event any such person or entity does, prior to the distribution to the Class of the consideration received under such settlement, seek the indemnification or contribution proscribed by this paragraph, Plaintiffs and Plaintiffs' counsel shall withdraw from and deem any settlement with such person or entity to be null and void, and return any consideration received under such settlement; and (iii) the Released Persons are expressly deemed third-party beneficiaries thereof.

15. Without affecting the finality of this Order and Final Judgment in any way, this Court reserves jurisdiction over all matters relating to the administration and consummation of the Settlement.

Dated: February 16, 2018



The Honorable Ronald Rubin
Judge, Circuit Court for Montgomery County, Maryland