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Case Number 264,2015

IN THE

Supreme Court of the State of Delaware

WALTER E. RYAN, JR.,

Plaintiff Below-Appellant,

v.

NAREN GURSAHANEY, THOMAS COLLIGAN, TIMOTHY DONAHUE, ROBERT DUTKOWSKY, BRUCE GORDON, BRIDGETTE HELLER, KATHLEEN HYLE, DINESH PALIWAL, KEITH MEISTER, and CORVEX MANAGEMENT LP,

Defendants Below-Appellees,

and

THE ADT CORPORATION, a Delaware Corporation,

Nominal Defendant Below-Appellee.

No. 264, 2015

COURT BELOW:
COURT OF CHANCERY OF THE STATE OF DELAWARE
C.A. NO. 9992-VCP

APPELLANT'S REPLY BRIEF

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August 27, 2015

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Plaintiff submits his Reply to the Answering Brief of Defendants Naren Gursahaney, Thomas Colligan, Timothy Donahue, Robert Dutkowsky, Bruce Gordon, Bridgette Heller, Kathleen Hyle, Dinesh Paliwal, and nominal defendant The ADT Corporation ("ADT" and collectively, the "ADT Defendants").[1]

INTRODUCTION

Defendants concede that demand futility can be sufficiently pled by alleging particularized facts that *either* the ADT Board perceived an actual threat (the "board-focused" perception approach) *or* that Meister took concrete steps to remove the ADT Board (the "agitator-focused" action approach). Defs' Ans. at 15-16. As explained in Plaintiff's opening brief at pp. 19-21, the Court of Chancery erred in solely requiring the pleading of the agitator-focused action approach and in ruling that Plaintiff's particular allegations involving the board-focused perception approach were legally insufficient. Mem. Op. at 18.

Plaintiff's opening brief, pp. 8-18, sets forth four entrenchment actions, taken over an approximately one-year period during which the ADT Board received and perceived actual threats of removal from Meister. Specifically:

First, less than two months after ADT was spun-off as a new public company, the Board jettisoned its long-term growth plan in favor of Meister's

[1] Defendants also include Keith Meister ("Meister") and Corvex Management LP ("Corvex"), who filed a "joinder." For convenience, Meister and Corvex together will be referred to as "Meister" and the ADT Defendants and Meister will be collectively referred to as "Defendants."

demand for a drastic increase in ADT's debt to fund share buybacks to artificially engineer a short-term increase in ADT's share price. The Board took this action just ten days after meeting with Meister (a known activist and protégé of Carl Ichan) (A0025-32 at ¶¶19-21, 24-30, 32-35).

Second, two weeks later, the ADT Defendants appointed Meister to the Board in exchange for a one-year standstill agreement that required Meister to vote in favor of the Company's slate of directors. The Board took this action after (i) Meister pressured them for a board seat to oversee the buybacks; (ii) ADT's Board Chairman "reminded" the rest of the Board that Meister would "likely" challenge their board positions if he was not appointed; and (iii) the Board received presentations from various consultants reporting on Meister's prior successful activist campaigns and that a majority of other ADT investors were likely to vote with Meister, as they had previously done in other campaigns organized by Meister, to remove ADT's Board if Meister's demands were not met (A0033-44 at ¶¶37-42).

Third, after Meister had joined the ADT Board and received non-public information about the competitive challenges facing ADT, ADT's Board agreed to accelerate its share buybacks and issue more dividends to prop up ADT's share price so Meister -- who had by this point again threatened the ADT Board, as documented by ADT's consultant, with removal via a leveraged public buy-out

and running a competing "slate" of directors -- could be afforded a favorable exit (A0053-56, 60-61 at ¶¶56-59, 68-69).

Finally, with the pending expiration of Meister's existing standstill agreement as an overhanging threat, in November 2013, the Board gave Meister an elevated price buyout with no constraints and in return for which Meister provided them a six-year extension of the standstill agreement (A0067-69 at ¶¶81-87).

In short, when Plaintiff's allegations of board perceived threats and entrenchment actions are viewed as a whole with reasonable inferences drawn, devoid of unnecessary assertions of what Meister did not actually do, and when the proper legal standards are applied, it is clear that the Court of Chancery erred in dismissing this case under Rule 23.1 for failing to sufficiently plead demand futility.

ARGUMENT

I. IN CONTRAST TO THE LOWER COURT, DEFENDANTS CONCEDE THAT DEMAND FUTILITY CAN BE SUFFICIENTLY PLED BY SOLELY ALLEGING PARTICULAR FACTS THAT THE BOARD PERCEIVED AN ACTUAL THREAT OF REMOVAL

Defendants concede that demand futility can be sufficiently alleged by pleading particular facts that the Board *perceived* an actual threat of removal, without having to plead that the agitator took action on his threats. Defs' Ans. at 15-16; *see also* Pltf's Br. at 19-21. This concession is not surprising given the logic and public policy underpinnings of this rule. A board's conveyed perception of a threat is a stronger indicator of whether it believed an actual threat existed than the removal steps an agitator takes, which may or may not have actually threatened the board. Focusing only on an agitator's actions, as the Court of Chancery narrowly did, encourages boards to respond to any challenges to their positions with quick and possibly imprudent entrenchment activity to avoid having the agitator taking action in furtherance of his/her threat.

Despite agreeing that Plaintiff's board-focused perception approach is appropriate, Defendants argue (inaccurately) that the Court below addressed, and merely found insufficient, Plaintiff's allegations that the Board perceived an actual threat of being removed. Defs' Ans. at 16 (citing Mem. Op. at 15, 18 & 19). While the Court of Chancery may have given lip service to a board-focused

perception analysis, it did not focus on the Board's documented conclusions related to the agitator's willingness, ability and stated intent to launch a successful removal campaign. Rather, the Court of Chancery conflated the agitator-focused approach and the board-focused approach, instructing that to plead that ADT's Board perceived an actual threat of removal, Plaintiff was required to allege concrete steps taken by Meister, such as "initiating a proxy contest or other public campaign to remove one or more ADT directors," Mem. Op. at 15, or allege "that Corvex or Meister actually took action aimed at removing one or more of the Director Defendants, by running a competing slate of directors, making a tender offer, or otherwise." *Id.* at 18 (further stating that "[t]he Complaint does not even allege that Meister or Corvex publicly advocated for the Board's removal" and that "there are no allegations that other hedge funds that held a significant amount of ADT stock were coordinating with Corvex or otherwise following its lead.").[2]

In addressing Plaintiff's extensive allegations outlining the Board's perceptions of Meister's threats of removal -- including allegations involving reasonable inferences from the ADT Board presentation materials and the ADT

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[2] Defendants' reference to page 19 of the Court of Chancery's opinion merely refers, like the other two cited pages, to the Court's general conclusion that Plaintiff failed to plead "particularized factual allegations suggesting that the Board perceived an 'actual threat' of removal," Mem. Op. 19, and neglects considering what allegations would be sufficient to plead the board-focused perception approach alone. For example, Credit Suisse found that many of ADT's top 20 shareholders would align themselves in Meister's ADT campaign, since they were also involved in Meister's past activist campaigns (A0040-41 at ¶40).

Board Chairman's statements recorded in the minutes -- the Court of Chancery found such allegations "tenuous at best and ... too speculative to raise a reasonable doubt of director disinterest," Mem. Op. 18, thereby disregarding all such allegations as insufficient as a matter of law.

As explained below, Plaintiff sufficiently pled particularized facts that the ADT Defendants documented Meister's ability and willingness to launch a successful removal campaign, and that the ADT Board perceived Meister as likely to do so, not once but twice. Contrary to the lower court's decision, the absence of particular concrete steps by Meister towards such removal is not fatal, as Defendants' concede, to Plaintiff's demand futility argument.

II. DEFENDANTS DISTORT THE LAW AND THE FACTS ALLEGED IN ARGUING THAT PLAINTIFF INSUFFICIENTLY PLED DEMAND FUTILITY

In challenging the sufficiency of the pleadings, the Defendants (A) misapply the law by interjecting a business judgment determination, an *Aronson* Prong 2 analysis, into what they concede is solely an entrenchment/independence determination (that is, an *Aronson* Prong 1 analysis); and (B) distort the particularized facts alleged, failing to draw reasonable inferences in Plaintiff's favor.

A. Defendants Apply The Wrong Law By Erroneously Interjecting A Business Judgment Determination Into An *Aronson* Prong 1 Analysis

Despite acknowledging that *Aronson v. Lewis,* 473 A.2d 805 (Del. 1984), and its progeny affords plaintiff two mutually exclusive ways to plead demand futility: the first requiring allegations of entrenchment to show that the directors' positions were actually threatened and that the board's response was motivated and reasonably related to the directors' retention of their positions (Prong 1), and the second requiring allegations that the board's actions were not a valid exercise of business judgment (Prong 2), Defs' Ans. at 14 (citing *Aronson*, 473 A.2d at 814; *Wood v. Baum*, 953 A.2d 136, 140 (Del. 2008)), Defendants erroneously inject *Aronson*'s Prong 2 business judgment analysis into this Court's assessment of Plaintiff's Prong 1 entrenchment allegations. *See* Defs' Ans. at 23 (asserting that the Court of Chancery concluded that the "Complaint fails to create a reasonable

doubt that the challenged transactions were the product of a valid exercise of business judgment") (citing Mem. Op. at 22-25); *see also id.* at 15, 34 (arguing that "[n]othing in the Complaint suggests that these were anything other than legitimate business judgments made with due care"). This Court has rejected the conflation of these prongs in a similar setting and ruled instead that "where the board perceives a threat, its response will not be upheld merely because the response serves 'any rational business purpose.'" *Kahn ex rel. DeKalb Genetics Corp. v. Roberts*, 679 A.2d 460, 465 (Del. 1996) ("a heightened standard of judicial review applies because of the temptation for directors to seek to remain at the corporate helm in order to protect their own powers and perquisites.") (citing *Unocal Corp. v. Mesa Petroleum Corp.*, 493 A.2d 946, 954 (Del. 1985) and *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971)).[3]

Defendants misapply *Kahn* (Defs' Ans. at 27) by ignoring the Court's recognition that a "board['s] perceive[d] threat" of removal, as sufficiently alleged here, triggers "a heightened standard of judicial review." *Kahn*, 679 A.2d at 465. Having sufficiently pled that the ADT Board perceived an actual threat, *see infra*,

[3] *See also Wells Fargo & Co. v. First Interstate Bancorp*, 1996 Del. Ch. LEXIS 3, at *19 (Del. Ch. Jan. 18, 1996) ("In all events, whether there were reasonable grounds for concluding that a threat was posed and whether the response was proportional to that threat are generally questions of fact to be decided at trial, not on the pleadings."); *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 72 (Del. 1995) ("[*Unocal*] scrutiny will usually not be satisfied by resting on a defense motion merely attacking the pleadings.").

II.B., heightened judicial scrutiny applies and a business judgment analysis is inapplicable. *See, e.g.*, *Kahn*, 679 A.2d at 465; *see also Aronson*, 473 A.2d at 816 (directors cannot "succumb[] to influences which convert an otherwise valid business decision into a faithless act.").[4]

B. Defendants Err, Like The Court of Chancery Did, In Evaluating Plaintiff's Allegations

Plaintiff is entitled to have all particular allegations credited and reasonable inferences drawn from the allegations of his complaint in his favor. *Brehm v. Eisner*, 746 A.2d 244, 255 (Del. 2000). That is, the Court cannot credit competing inferences. In violation of those standards, Defendants parrot the Court below's errors, and make additional errors by omitting important allegations, mischaracterizing other allegations, failing to draw reasonable inferences and evaluating the pleadings piecemeal rather than as a whole.

It is clear that over an approximately one-year period, the ADT Board received and admittedly perceived actual threats of removal from Meister and responded with entrenchment actions:

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[4] Defendants erroneously rely on *Cottle v. Standard Brands Paint Co.*, Defs' Ans. 15, 23, which recognized *Aronson*'s two prongs as distinct. *Cottle*, 1990 Del. Ch. LEXIS 40, at *22-23 (Del. Ch. Mar. 22, 1990) ("Even if there is no directorial interest or lack of independence [under the first prong], demand will be excused under the second prong of *Aronson* if the facts alleged in a complaint raise a reasonable doubt that the board's actions will be protected by the business judgment rule."). Defendants compound their error by relying solely on *Cottle*'s analysis of *Aronson*'s Prong 2. Defs' Ans. at 23, 33 (citing *Cottle*, 1990 Del. Ch. LEXIS 40, at *23).

(1) in November 2012, less than two months after ADT spun-off as a new public company and just ten days after meeting with Meister (a well-known activist investor and protégé of Carl Ichan), ADT's Board jettisoned its then recently announced intention to maintain a "solid investment grade rating" and also its growth-through-acquisitions plan, and acquiesced to Meister's demand for a drastic increase in ADT's debt and use of available cash flow to repurchase $2 billion of ADT stock over a three-year period, which, when announced, was met with skepticism by analysts and downgrades by credit rating agencies (A0025-32 at ¶¶19-21, 24-30, 32-35);

(2) in December 2012, just about two weeks later, as Meister pressured for a seat on ADT's Board and the ADT Board received presentations from its consultants, Credit Suisse and Lazard Freres, reporting on Meister's prior successful activist campaigns and their findings that (i) Meister was currently "engag[ing] in an activist campaign" with respect to ADT; (ii) Meister was ADT's largest investor and the most willing and capable to align with (and influence) a majority of other ADT investors who were likely to vote with Meister to remove ADT's Board if Meister's demands were not met; and (iii) after ADT's Board Chairman "reminded" the rest of the Board that Meister would "likely" challenge their board positions if he was not appointed, the ADT Defendants appointed Meister to ADT's Board in exchange for a one-year Standstill Agreement that required Meister to vote in favor of the Company's slate of directors (A0033-44 at ¶¶37-42);[5]

(3) by March 2013, Meister learned from his board position that ADT's future profits and customer growth were being adversely affected by competition and that ADT's capacity for acquisitions, one of ADT's vehicles for growth, was significantly reduced because of the diversion of funds to the Meister-directed share repurchase program. Rather than address the problems that competition was causing to ADT's long-term growth, Meister (realizing that ADT would never reach his publicly announced target price of $60 to $80 per share), again threatened the ADT Board (as documented by ADT's consultant Centerview Partners) with removal, this time specifically threatening a leveraged public buy-out and running a *competing slate of directors if ADT's Board did not agree to add to the problem by*

[5] By having "reminded" the Board of this likelihood, it is undisputable that the Board had been previously informed that Meister would seek to remove them if his demands were not satisfied.

accelerating its leverage target and share buybacks, and issuing increased and special dividends to prop up ADT's share price while he pressed for a profitable exit. On July 31, 2013, ADT announced a new targeted leverage ratio of 3.0x debt to EBITDA, the same ratio Meister initially demanded eight months earlier, which resulted in further credit rating downgrades. Then, on September 23, 2013, ADT announced a special dividend of $0.125 per share and plans to offer $1 billion in unsecured notes. The ADT Board also authorized a 60% increase in its dividend in November 2013. ADT's rapid acceleration of its repurchase program at the direction of Meister resulted in ADT reaching its $2 billion repurchase capacity in November 2013, just one-year from the start of the program and two years ahead of the initial three-year authorization plan, requiring ADT's Board to authorize a $1 billion authorization increase to accommodate repurchasing Meister's shares (A0046-49, 51-54 at ¶¶47-49, 54, 56-58); and

(4) On November 25, 2013, after just enacting the increase in buyback authorization, ADT's Board repurchased 10.24 million ADT shares from Meister in a private transaction for over $450 million, which provided Meister a $60 million profit and resulted in ADT's share price declining over 7% when Meister's exit was publicly announced. In return for his profitable exit, Meister agreed to a six-year extension of the Standstill Agreement. Meister's exit came just two months prior to ADT's public announcement that it badly missed the Company's guidance and analysts' consensus estimates, and revelations of a far-worse-than-forecasted financial condition and diminished future prospects, which caused another significant drop, 17%, in ADT's share price (A0058-61, 63-65, 67-69, 71-73 at ¶¶66-69, 74-75, 78-79, 83-85, 87, 91-95).[6]

[6] Defendants argue that the Board did not acquiesce to Meister's demand in 2013. Defs' Ans. at 4. In so doing, Defendants ignore the clear statements by Centerview Partners, the accelerated plan that was implemented, the increase in ADT's debt capacity, the share repurchase authorization and dividend payments to shareholders, the prop up of the share price, and the agreement to buy Meister out in a private transaction at a significant profit before publicly disclosing the Meister buyout to avoid Meister being adversely affected by the significant drop in ADT's share price caused when Meister's exit was announced (A0067-68 at ¶¶83-85).

In their opposition, Defendants engage in piecemeal and unfair attacks on Plaintiff's allegations and fail to view them as an integrated whole.[7] These allegations, when properly viewed from the "board-focused" perception approach, demonstrate that during the one-year period that Meister was an ADT investor, the ADT Board provided special treatment to Meister because they perceived actual threats from him on several occasions and caved-in to Meister's demands each time to avoid removal. The ADT Board's decisions and short-term actions -- quickly ratcheting up debt and diverting cashflow that could be used for growth and acquisitions -- are made suspect because they were economically detrimental to ADT in the long term. ADT was facing rising costs and lower market share from increased competition (a problem ADT could not address at the same time they were appeasing Meister). The Board's actions also resulted in ADT's credit rating dropping and its shares being repurchased at inflated prices and ultimately collapsing. *See, e.g.*, *Chrysogelos v. London*, 1992 Del. Ch. LEXIS 61, at *25-26 (Del. Ch. Mar. 25, 1992) (recognizing numerous courts holding that "economically

[7] *See, e.g.*, *Lewis v. Aronson,* 466 A.2d 375, 385 (Del. Ch. 1983), *rev'd on other grounds by Aronson v. Lewis*, 473 A.2d 805 (Del. 1983) ("Each case in which there has been no demand must, therefore, by its very nature, be carefully scrutinized and analyzed according to its own unique set of facts, taking into account the *totality of the circumstances* and the competing interests.") (emphasis added) (citing *Bergstein v. Texas Int'l Co.*, 453 A.2d 467, 469 (Del. Ch. 1982)).

questionable" transactions "suppl[y] added reason to doubt that ... the transactions were motivated by business (as opposed to control-related) considerations.").[8]

More importantly, Defendants, as well as the Court of Chancery, make consistently distortive inferences from Plaintiff's allegations. For example, they both fail to acknowledge that the ADT Board's consultants recognized that Meister would *likely* obtain support from shareholders holding a majority of ADT's outstanding shares (over 53%) in any attempt he made to remove the ADT Board (A0040-41 at ¶40), and, instead, harp on Meister only "owning 5% of ADT's shares." Defs' Ans. at 2, 33; Mem. Op. at 1, 18. Likewise the Defendants improperly recast Plaintiff's allegation, as the Court of Chancery did, that ADT's Chairman of the Board merely "believ[ed] that Corvex *might* seek to elect Meister to the Board if the Board did not agree to invite him to join," Defs' Ans. at 3; Mem Op. at 18 (emphasis added), rather than credit Plaintiff's allegation (sourced from

[8] Several analysts and credit rating agencies were critical of the ADT Defendants' decisions throughout this period. *See, e.g.*, A0031-32 at ¶¶33, 35 (after ADT announced its capitulation to Meister's debt and repurchase demand, one analyst noted the Board's action as unprecedented, stating "[n]ever have we seen a spinoff in as much of a hurry to reward stockholders at the expense of credit quality as ADT" and credit rating agencies downgraded or gave a negative outlook on ADT's debt); A0058 at ¶67 (Fitch again downgraded ADT in July 2013, as result of ADT's "chang[ing] financial strategy and [its] increasing its leverage target," when not too long ago it "reiterated its commitment to an investment grade rating"); and A0068 at ¶84 (Morningstar issued a report the same day as ADT's announcement of Meister's exit, which criticized "[t]he share sale by Corvex [as] send[ing] a negative signal to the market that ADT is no longer the great investment it was originally thought" and "Corvex likely scored around a 10% gain on its stock purchases ... but ... [i]n its 50-slide presentation to investors a year ago, Corvex argued that ADT was worth anywhere from $61 to $83.").

Defendants) that "*reminded*" the Board that Corvex would "*likely*" do so (A0033 at ¶37) (emphasis added).[9] The terms "likely" and "might" are vastly different in meaning. "Likely" is defined as "having a high probability of occurring or being true," whereas "might" is defined as "less probability or possibility than may" and "may" is defined as "used to indicate possibility or probability."[10] Clearly, Plaintiff was not given the favorable inference for the word "likely."

Similarly, Defendants improperly challenge the merits of Plaintiff's allegations that Meister sought to remove the entire ADT Board at various times by arguing that Meister was at most only seeking "a single board seat." Defs' Ans. at 18. The source of the allegations, Defendants' own board materials and admissions, clearly shows that Meister threatened the entire ADT Board, which is why ADT Board's consultants assessed positively Meister's willingness and ability to launch such a campaign in November/December 2012 (A0033-42 at ¶¶37-40) (identifying Meister's willingness and ability to "[i]nitiate 'vote withhold/against' campaign to attack *one or more incumbent*" directors) (emphasis added), and again

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[9] Defendants point to a general description made by ADT's consultant, Credit Suisse (A0036 at ¶38), of Meister as "a traditional non-activist hedge fund that vowed to be less confrontational than Meister's former employer, Carl Icahn," Defs' Ans. at 3, 8-9, 17, 33, yet, Defendants ignore Credit Suisse's specific finding that with respect to ADT, Meister was actually "engag[ing] in an activist campaign" and had engaged in others in the past (A0034, 36-37 at ¶38).

[10] *See* www.merriam-webster.com/dictionary/likely, www.merriam webster.com/dictionary/might and www.merriam-webster.com/dictionary/may (last visited on August 23, 2015).

in August/September 2013 (A0060-61 at ¶¶68-69) ("Corvex has indicated that if its leverage timeframe is not adopted, it would present an alternative capital allocation framework (a 'Public LBO') and run *a competing slate of directors* to be voted on at ADT's 2014 [annual meeting]") (emphasis added). A "slate" refers to the entire board.[11]

Other distortions of the Plaintiff's allegations include:

- misleadingly asserting that "Ryan acknowledges that the Board adopted a more modest share repurchase program than Corvex proposed (reducing ADT's outstanding share count by only about half the percentage reduction Corvex advocated) and adopted a leverage ratio target of 2.0x debt-to-EBITDA, rather than the 3.0x that Corvex sought," Defs' Ans. at 8; *id.* at 4, 24, ignoring that ADT, just about eight to twelve months later, acquiesced at Meister's insistence to an even more aggressive leverage plan, this plan included the initially demanded 3.0x leverage ratio, an even more accelerated repurchase timetable (reaching the $2.0 billion capacity in one-year rather than three) and with increasing dividends and the issuance of a special dividend, all of which was designed to facilitate Meister's exit a short time later at a significant profit and before ADT's stock significantly declined (A0058-60, 63-65 at ¶¶66-67, 74-75, 78-79) [12];

[11] Defendants also erroneously argue that Plaintiff insufficiently pled that Defendants' defensive responses to the perceived threats of removal from Meister -- *i.e.*, acquiescing to all of Meister's demands, entering into the Standstill Agreement, extending the Standstill Agreement and facilitating Meister's profitable exit -- were entrenchment motivated. Having sufficiently pled that the ADT Defendants perceived a threat on at least two occasions and that their responses were economically suspect, the reasonable inference to draw is that the ADT Defendants' decisions were at least primarily entrenchment motivated.

[12] Defendants concede that they did "increase [ADT's] leverage target again in July 2013," Defs' Ans. at 24, but fail to acknowledge that it was to the 3.0x level Meister initially demanded, or that ADT's debt, buyback plan and dividend payments were also increased and accelerated. Defendants instead baldly state that "Ryan does not allege any facts suggesting that the July 2013 decision was motivated by any threat from Corvex." Defs' Ans. at 24. To the contrary, the closeness in time of these actions to the August 2013 documented threat by Meister to initiate a

(continued . . .)

- attempting to defuse Plaintiff's allegations that ADT publicly and deceptively announced to analysts on May 1, 2013 that it intended to abide by its original $2 billion, three-year share repurchase program announced in November 2012, and that it did not intend to increase its 2.0x EBITDA target leverage, which it abandoned two months later when it substantially increased its target leverage to 3.0x (A0051-53, 58-60 ¶¶54 & 66-67), by arguing that "ADT told analysts it would *likely* revisit its strategy." Defs' Ans. at 10 n.5 (emphasis added) (citing the May 1, 2013 conference call transcript at B45-46). Nothing in the transcript to which Defendants refer states that ADT would revisit its strategy, let alone indicates that such an event was "likely." Rather, the transcript states that "nothing has changed," ADT "ha[d] nothing new to report" (B45), and that "anything we do at this stage is going to be consistent with the $2 billion three-year share repurchase program that we announced back in November" (B48). Moreover, Plaintiff's reference to Fitch's August 2013 downgrade of ADT's credit rating supports Plaintiff's interpretation. Fitch pointed out that ADT "reiterated its commitment to an investment grade rating" and "changed its financial strategy" in July 2013 (A0059-60 at ¶67); and

- misleadingly contending that "Corvex sold the majority of its stock back to ADT at the market price -- with no premium at all," Defs' Ans. at 4, 25, which fails to account for the significant and immediate drop in ADT's stock price and an even larger price drop just two months later when the real effects of competition were reported in ADT's badly missed earnings release[13] (A0044-45, 64-65, 67-68, 72-73 at ¶¶43-44, 78, 83-85, 95).[14]

(. . . continued)

"Public LBO … and run a competing slate of directors" if his capital allocation timetable was not adopted (A0060-61 at ¶¶68-69) strongly suggests that all these actions were driven by Meister's threats. Certainly that is a reasonable inference to draw. *See, e.g.*, *Chrysogelos*, 1992 Del. Ch. LEXIS 61, at *27 (finding actions directors "began to take immediately … and concluded within the short space of six months, strongly suggest a control retaining motive.").

[13] Defendants also wrongly assert that connecting ADT's January 2014 badly missed earnings report and significant price drop to Meister's exit "is based entirely on hindsight" because "the Complaint does not allege that … either Corvex or ADT's directors were aware of any non-public information concerning what ADT's next quarterly results would be." Defs' Ans. at 28. In fact, Plaintiff alleges that Barclays issued a report after ADT's missed earnings release that connected the two events and questioned ADT's "credibility" (A0072 at ¶93) ("A far worse-

(continued . . .)

In short, both Defendants and the Court below have distorted Plaintiff's allegations. Plaintiff was not given the proper inferences to which he is entitled at this stage of the proceedings and this Court should find that Plaintiff adequately pled demand futility. *See Rales v. Blasband*, 634 A.2d 927, 934 (Del. 1993) ("we reject the defendants' proposal that ... a plaintiff must demonstrate a reasonable probability of success on the merits").

(. . . continued)

than-expected quarter out of ADT which raises the question of management's credibility and the unusually structured deal the company made with a board member announced on 11/25/13. ... We had a number of questions from investors regarding the structure of this deal at the time it was made and given today's earnings we suspect more questions will arise. Beyond the credibility questions, [we have] add[ed] concerns over impacts from competition on growth and pricing.").

[14] Defendants suggest that they were unable to structure the repurchase of Meister's shares over a period of time in the future, as they did in structuring the two similar sized blocks of shares they agreed to repurchase with JPMorgan Chase and Credit Suisse. Defs' Ans. at 29-30. Defendants are merely trying to distract from the clear showing that Meister was provided special treatment and wrongfully interjecting issues outside the pleadings on this motion to dismiss.

CONCLUSION

For all the foregoing reasons, the Court of Chancery's Rule 23.1 dismissal should be reversed and the case remanded for further proceedings.

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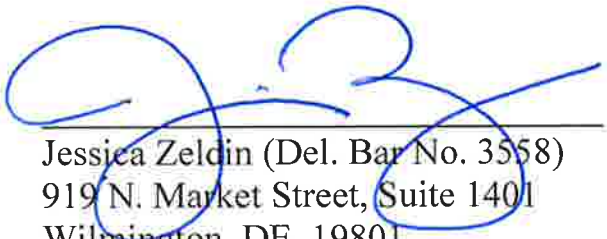

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August 27, 2015

CERTIFICATE OF SERVICE

I HEREBY CERTIFY this 27th day of August, 2015 that I caused a copy of APPELLANT'S REPLY BRIEF to be served upon the following counsel in the manner indicated:

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