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Re: In re William Lyon Homes Shareholders Litigation
C.A. No. 2015-N; Consolidated
Date Submitted: August 9, 2006

Dear Counsel:

The controlling stockholders of Nominal Defendant William Lyon Homes (the "Company") sought to take the Company private. Their goal was to obtain

90% of the common stock and then “freeze out” the remaining shareholders through a short-form merger.¹ When the tender offer at a price of \$93 per share was announced on Friday, March 17, 2006, the Company’s common stock was trading at approximately \$76 per share. An action challenging the proposed transaction was promptly filed here on the following Monday, March 20, 2006; another action was filed here the next day; and, on March 22, 2006, they were consolidated (the “Delaware Action”). An expedited schedule, including a preliminary injunction hearing, was established in the Delaware Action on March 23, 2006. Intervenor Alaska Electrical Pension Fund (“Alaska”) filed its action in California (the “California Action”) on the day the tender offer was announced. The complaints raised disclosure issues, claimed that certain structural aspects of the tender offer made it coercive, and contended that the price was unfair.

Following some preliminary skirmishing, the parties in the Delaware Action reached a tentative settlement agreement on April 10, 2006: the price per share was increased to \$100 and the Defendants agreed to pay (or agreed not to oppose) a

¹ See generally *In re Pure Res. S’holders Litig.*, 808 A.2d 421 (Del. Ch. 2002).

separate fee award of \$1.2 million.² Efforts were undertaken, but without success, to resolve the California Action as part of the Delaware Action.

After the execution of a memorandum of understanding designed to provide the basis for resolving the Delaware Action, the per-share price was increased yet again. One investor (the “Investor”) held a substantial stake in the Company, and it had become apparent that, without its favorable response to the tender offer, the controlling shareholders’ goal of reaching 90% ownership was in jeopardy. The Investor, with no more than minimal assistance from the lawyers working in either the Delaware Action or the California Action, was able to negotiate an increase in the per-share price to \$109. The settlement of the Delaware Action was revised to reflect this increase in share price which was made available to all public shareholders. Alaska still did not participate in the settlement of this action.³

² The fee was negotiated only after agreement on the other issues had been reached. Among the other benefits achieved were: (1) agreement that the shares held by the Company’s president would not be counted for purposes of determining whether a majority of the minority supported the transaction; (2) disclosure of certain actions taken during a previous tender offer which resulted in the departure by four directors from the Company’s Board; (3) correction of a previous representation that the initial tender price had been set without consultation with any financial adviser; and (4) agreement that, if the tender offer were successful but the short-form merger did not occur, there would be no effort to terminate registration of the remaining public shares.

³ As formal settlement of the Delaware Action approached, the California Action was stayed. *See* Aff. of S.J. Oddo, Ex. O.

This Court approved settlement of the Delaware Action but withheld decision on the award of attorneys' fees and expenses because Alaska had sought an award of fees for its attorneys, earned by their prosecution of the California Action, through this action.⁴ Delaware Counsel oppose any sharing of any fees with their colleagues in California. Delaware Counsel also suggest that, if the Court concludes that California Counsel are entitled to an award of fees, then that sum should be assessed against the Defendants in addition to the \$1.2 million which the Defendants, in effect, agreed to pay to them, subject to Court approval. Not surprisingly, the Defendants have not taken kindly to the notion that they should be burdened with the payment of attorneys' fees in excess of \$1.2 million.

The standards governing an award of attorneys' fees to counsel who pursued substantially identical litigation in a different forum, who did not participate in the Delaware proceedings, and whose client's claims have been mooted by settlement of the Delaware proceedings were set forth in *Infinity Broadcasting*.⁵ The Court

⁴ Alaska was granted leave to intervene in this action in order to press its claim for an award of attorneys' fees. In the California Action, Alaska is represented by Lerach Coughlin Stoia Geller Rudman & Robbins and Soltan & Associates (collectively, the "California Counsel"). Plaintiffs in the Delaware Action are represented by Rosenthal, Monhait & Goddess, P.A., Chimicles & Tikellis LLP, Wolf Popper LLP, and Schiffrin & Barroway, LLP (collectively, the "Delaware Counsel").

⁵ *In re Infinity Broad. Corp. S'holders Litig.*, 802 A.2d 285 (Del. 2002).

must first determine the amount of a proper award for attorneys' fees and costs. That involves application of the so-called *Sugarland* factors which include: (1) the results accomplished for the benefit of the stockholders; (2) the efforts of counsel; (3) the contingent nature of the fee; (4) the challenges posed by the litigation; and (5) the standing and ability of Plaintiffs' counsel.⁶ Next, the Court must determine the proper allocation, if any, among counsel here and counsel elsewhere. "Counsel pursuing litigation in any jurisdiction [are] entitled to a share of the attorneys' fees in a settlement of a Delaware action if their efforts elsewhere conferred a benefit realized as part of the Delaware settlement."⁷ The party seeking an award for its attorneys' efforts in a foreign jurisdiction must establish a "causal connection" between its attorneys' efforts and the benefit conferred here upon the plaintiff class; the "mere pendency" of other litigation in different jurisdictions involving the same claims is not sufficient to satisfy that burden.⁸ Finally, ascertaining an appropriate attorneys' fee is difficult enough for the trial judge who has had the benefit of watching the litigation progress. The task, obviously, is

⁶ *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149 (Del. 1980).

⁷ *Infinity Broadcasting*, 802 A.2d at 291.

⁸ *Id.* at 293.

much more difficult when all of the work for which California Counsel now seek a fee award was performed in a different forum.⁹ With these principles in mind, the Court now turns to the questions of (1) an appropriate award of attorneys' fees and (2) whether Alaska's attorneys are entitled to share in that award.

Application of the *Sugarland* factors to establish a fair and adequate fee for the legal services that caused the class benefits resulting from settlement of the Delaware Action is relatively straightforward. The primary benefit was the price increase from \$93 per share to \$100 per share, as the Delaware Action had been settled in principle before the price was increased to \$109 per share. Thus, in addition to certain disclosures and structural modifications, the readily quantifiable benefit attributable to the Delaware Action was \$11.5 million for the public shareholders.¹⁰ This litigation moved quickly and required significant commitment

⁹ *See id.* at 292.

¹⁰ This is the financial benefit attributable to the increase in the per share price from \$93 to \$100. Thus, an award of \$1.2 million would be roughly equal to 10% of that increase in consideration.

The decision to allow any of the attorneys to claim credit for the increase in share price from \$93 to \$100 is not free from doubt. The Investor was able to negotiate an increase from \$100 per share to \$109 per share. This suggests one or both of the following: (1) the Investor (*i.e.*, without Delaware Counsel or California Counsel) could have achieved the increase from \$93 to \$109 per share on its own and (2) Delaware Counsel did not maximize the potential benefit. Delaware Counsel, in fact, obtained the increase from \$93 to \$100 per share, but they lacked the economic power that enabled the Investor to extract the additional \$9 per share.

from counsel.¹¹ Expedited discovery and briefing of a motion for a preliminary injunction were accomplished. Delaware Counsel are also experienced in this type of litigation. Although one cannot say that the litigation was easy, much of the path followed by the Plaintiffs had been carved out by the *Pure Resources* line of cases. The fees for Delaware Counsel were contingent, and, thus, in the absence of obtaining material benefit for the shareholder class, they would not have been paid for their efforts. After balancing all of these considerations, the Court concludes that a fee (to include expenses) of \$1,200,000 is fair and reasonable compensation for the Plaintiffs' attorneys' efforts in advancing the interests of the stockholder class and achieving the benefits of the settlement.¹²

¹¹ Delaware Counsel report devoting 1,237 hours and incurring expenses of \$44,212.70. *See* Aff. of C. L. Stine in Supp. of Proposed Settlement and Fee Request, Ex. E & F; Aff. of A. Barroway, ¶ 2-3; Aff. of C.P. Keener, ¶ 2-3. California Counsel correspondingly report (for one of the firms) 366 hours and \$25,000 in expenses for the California Action. Aff. of S.J. Oddo, Ex. P.

¹² This represents the total in fees and expenses which the Defendants are obligated to pay. Thus, the Court need not resolve the debate over whether the Court may (or should) order Defendants to pay in excess of the \$1.2 million set forth in the Settlement Agreement if it turns out that any award should be paid to California Counsel. The Defendants agreed not to oppose a fee application not to exceed \$1.2 million. The award of fees and expenses, of course, was subject to Court approval. The benefit to the class that was actually received by the class was formally awarded through the Delaware Action. The benefit caused by the Delaware Action is, thus, the appropriate metric for assessing the benefit conferred by all counsel, whether acting in California or in Delaware.

Next is the question of whether the efforts of California Counsel in the California Action “resulted in a benefit to the class derived from the [Delaware] settlement.”¹³ Settlements are frequently influenced by many factors. Those who wish for a wholly rational and transparent process are likely to be disappointed. Adversaries take positions; they have their various motivations and concerns; sometimes knowledge is not equally shared; the resolution ultimately reflects what both sides will accept. Here, the settlement was fair and reasonable; that, of course, does not equate with the best possible outcome. Because many factors influence reaching a settlement, isolating and quantifying the contribution of any one set of participants in the process—in this instance, the attorneys in California—is an imprecise effort at best.

Delaware Counsel seek to minimize the contributions of California Counsel. They contend that the work of California Counsel was merely duplicative of the work they performed in the Delaware Action.¹⁴ Indeed, they point out that,

¹³ *Infinity Broadcasting*, 802 A.2d at 292. The question of causation—a benefit in fact to the stockholder class—is, of course, fact-dependent. The parties have submitted this dispute on a paper record—essentially dueling affidavits which are reasonably consistent with respect to specific historical facts and which characterize the various efforts undertaken by counsel with sometimes quite divergent descriptions.

¹⁴ *See, e.g., Sanders v. Wang*, 2001 WL 599901, at *3 (Del. Ch. May 24, 2001).

although California Counsel participated in some discovery, they did not even attend the depositions of all of the key witnesses. Delaware Counsel moved for expedited treatment on March 23, 2006, before California Counsel sought expedited treatment there, on March 27, 2006. Moreover, Delaware Counsel prepared briefing in support of a preliminary injunction, a task California Counsel do not claim to have initiated. In short, although Delaware Counsel acknowledge that work was performed by California Counsel, they dispute that the efforts of California Counsel achieved any material and cognizable benefit for the Company's public shareholders.

On the other hand, California Counsel report their timely filing of a complaint in California, their application for expedited limited discovery,¹⁵ their participation in discovery, and their negotiations with the Defendants, including several rounds of correspondence with the Special Committee appointed to evaluate the offer.¹⁶ Their action was the only one not tentatively settled when the increase to \$109 per share occurred. Yet, they cannot reasonably claim any credit for an increase above the \$100 per share because this

¹⁵ Aff. of S.J. Oddo, Ex. E.

¹⁶ Aff. of S.J. Oddo, Exs. C & D. For this and the balance of their efforts, California Counsel seek a 67% share of any fees awarded. Alaska's App. for an Award of Attys' Fees and Expenses at 28.

was caused exclusively by the Investor. Although California Counsel (and Delaware Counsel, for that matter) spoke with the Investor and shared data and analysis,¹⁷ there is nothing to suggest that the minimal level of aid assisted the private investor in any cognizable manner. In short, the Investor was the driving force behind the increase from \$100 per share.

Moreover, California Counsel have been unable to identify any specific contribution toward achieving the initial settlement reached by Delaware Counsel. They did nothing more than duplicate the activity of Delaware Counsel and took some preliminary steps to move the California action forward. Ultimately, California Counsel have nothing to offer but the argument that the California Action must have incentivized the Defendants to settle the Delaware Action. Unfortunately, on this record, that is nothing more than speculation. Nothing proffered by California Counsel demonstrates, as required by *Infinity Broadcasting*, any causal connection between their efforts and the Delaware settlement. In short, California Counsel brought a companion action in California; the “mere pendency” of that action, however, is simply insufficient to allow this

¹⁷ See Aff. of S.J. Oddo, Ex. M.

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Court to order a sharing of fees with them. Otherwise, whenever a shareholder's action is filed in Delaware, counsel could file a similar action in another state, do some work, and, following resolution here, step forward in search of an award of fees. *Infinity Broadcasting*, however, is clear in requiring that "causal connection," something which California Counsel have not shown.

Accordingly, the Court awards fees and expenses of \$1.2 million to Delaware Counsel. Alaska's application for an award of fees and expenses for California Counsel is denied. Counsel are requested to confer and to submit a form of order to implement this letter opinion.

Very truly yours,

/s/ John W. Noble

JWN/cap

cc: Register in Chancery-NC