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Re: In re William Lyon Homes Shareholder Litigation
Consolidated C.A. No. 2015-VCN
Date Submitted: December 1, 2008

Dear Counsel:

The pending application for an award of attorneys' fees is on remand from the Delaware Supreme Court. The background of this dispute has been fully set

forth in this Court's December 21, 2006,¹ letter opinion and in the Supreme Court's December 21, 2007, opinion,² and will not be repeated at length here. Only a brief recitation of the facts relevant to the Court's analysis and decision follows.

* * *

A going private transaction involving William Lyon Homes ("Lyon Homes"), a Delaware corporation, generated litigation both in Delaware and in California. The original tender price of \$93 per share was increased to \$100 as the result of settlement of this action in Delaware.³ The California Action did not settle. That increase in tender price was not enough to assure the satisfaction of the tender offers' majority of the minority condition.⁴ Chesapeake Partners ("Chesapeake") held a sizeable, approximately 3.5%, interest in Lyon Homes. Without its participation (or the participation of some other mix of stockholders), the outcome of the tender offer remained in doubt. The per share price, to the

¹ *In re William Lyon Homes S'holder Litig.*, 2006 WL 3860916 (Del. Ch. Dec. 21, 2006).

² *Alaska Electrical Pension Fund v. Brown*, 941 A.2d 1011 (Del. 2007).

³ Stipulation and Agreement of Compromise, Settlement and Release at ¶ 24 ("Plaintiffs' Counsel in the Delaware Action contributed to the . . . increased consideration from \$93 to \$100 per share").

⁴ Leary Aff., Ex. A.

benefit of all stockholders, was increased to \$109 per share following negotiations between representatives of General William Lyon (“General Lyon”), Lyon Homes’ controlling stockholder, and Chesapeake. It must be emphasized that the second increase occurred after the Delaware Action had settled and while the California Action was the only pending litigation.

* * *

Intervenor Alaska Electrical Pension Fund (“Alaska”) was the plaintiff in the California litigation. It intervened here to seek an award of fees, both with respect to the increase from \$93 to \$100 per share and the increase from \$100 to \$109 per share. This Court denied its fee application with respect to the initial increase. That decision was affirmed.⁵ This Court also denied Alaska’s fee application with respect to the second increase, the increase that occurred while it was the plaintiff in the only pending litigation.⁶ That denial was premised on the perceptions (1) that the second increase would not have occurred except for the efforts of Chesapeake and (2) that there was no evidence establishing a causal

⁵ *Alaska Electrical Pension Fund*, 941 A.2d at 1016.

⁶ No material progress was achieved in the California Action during the period between the first and second increases.

connection between Alaska's efforts and the increase. That analysis, however, was incorrect, and this Court's decision was reversed.⁷

The Supreme Court concluded that this Court had erred by requiring Alaska to demonstrate some causal connection under *Infinity Broadcasting*⁸ between its efforts and the second increase. Instead, as the Supreme Court held, Alaska enjoys the benefit of a presumption that its efforts bore a causal connection to the second increase by virtue of its position as the plaintiff in the only litigation pending at the time of the second increase.⁹

This Court again considers Alaska's fee request and recognizes, this time, that, unless and until proven otherwise, Alaska's efforts are presumed to be a cause of the second increase. Even though Alaska has conceded it was not a direct cause of the second increase,¹⁰ the burden, nevertheless, is on the Defendants—or,

⁷ *Alaska Electrical Pension Fund*, 941 A.2d at 1016.

⁸ *In re Infinity Broad. Corp. S'holders Litig.*, 802 A.2d 285 (Del. 2002).

⁹ *Alaska Electrical Pension Fund*, 941 A.2d at 1016 (“Because Alaska was the only remaining adversary, parity of reasoning requires that Alaska be given the same presumption of causation originally granted to the Delaware plaintiffs.”).

¹⁰ Alaska's Mot. for Recons. or For a New Trial ¶ 2 (stating that the increase to \$109 was “not directly caused by the Alaska action”). It is possible that Alaska intended something else by this statement, as more than one meaning of direct causation may be imagined. The Court fully understands Alaska's position that, either as a result of the pendency of the California Action or as a result of communications between Alaska's counsel and Chesapeake, it contributed to the second price increase.

perhaps, the Delaware Plaintiffs—to demonstrate that Alaska was not a cause in any way, even indirectly, of the second increase.

* * *

Following remand, the parties engaged in discovery—both paper and deposition. Stephen Oddo and Darren Robbins, two of Alaska’s attorneys, Bryan Long, a representative of Chesapeake, and General Lyon, and his son, William H. Lyon, were deposed. In addition, affidavits of General Lyon, Michael J. DeMarco, the Lehman Brothers representative who provided financial guidance to General Lyon, and Michael G. Yoder and Thomas Leary, who both provided legal services to the Defendants, have also been submitted.

* * *

The Court now finds, based on the record established after remand, as informed by the record at the time of its earlier decision, that the parties opposing Alaska’s fee application have rebutted the presumption that benefits Alaska in its application. In other words, they have demonstrated that Alaska and its attorneys were in no way a cause of the second tender offer price increase. The Court first looks to the evidence demonstrating why the price increase occurred.

After the first increase, sufficient shares had not been tendered to meet General Lyon's needs. He needed Chesapeake to tender. He and his financial advisors recognized the leverage Chesapeake enjoyed as the owner of enough additional shares to satisfy the tender offer's majority of the minority condition. The evidence demonstrates that General Lyon was motivated to increase the tender price only by Chesapeake (as perhaps assisted by Polygon,¹¹ another large stockholder) in order to secure the tender of its shares.¹² The second increase occurred solely as the result of negotiations between Chesapeake and General Lyon (or his representatives). This excludes Alaska as a cause for General Lyon's decision to acquiesce in the second increase. Counsel for Alaska did not negotiate with General Lyon or any of his advisors regarding the second price increase. The Court notes that General Lyon's recollection of how the price increase came about is confirmed by Mr. Yoder, counsel for Defendants,¹³ and Mr. DeMarco of Lehman Brothers, who stated that he and General Lyon:

¹¹ General Lyon's Reply Mem. in Supp. of Suppl. Br. in Opp'n of Fee Appl. at 6 n.6.

¹² General Lyon Aff., ¶ 12 ("my solitary goal as of April 24 was to obtain enough shares to satisfy the Majority of the Minority condition and complete my Tender Offer. Accomplishment of that goal had nothing to do with Alaska's counsel or the California Action.").

¹³ Yoder Aff., ¶¶ 8-9.

discussed a strategy to conduct an aggressive search for holders of Lyon Homes common stock and to determine what terms would persuade them to tender their shares. Our discussion focused on shareholders with a large number of shares, including [Chesapeake] and [Polygon] . . . General Lyon authorized me to discuss the possibility of a higher price if it would convince shareholders with significant holdings to tender their shares I discussed with Ms. Lerner [a representative of Chesapeake] what terms would persuade Chesapeake to tender its shares. It was clear to me from my discussion with Ms. Lerner that the Tender Offer price was her only issue. . . . Although Ms. Lerner initially sought a Tender Offer price of \$115 to \$120, on or about April 28 we ultimately agreed on a price of \$109.¹⁴

General Lyon's testimony (and that of his advisors), however, may not necessarily be conclusive. He is, after all, an interested party and it is possible that Alaska could have helped Chesapeake, and thereby contributed a benefit to the stockholders, without General Lyon's knowledge. The Supreme Court summed up the possible factual basis supporting a role for Alaska:

At some point during these negotiations [between Chesapeake and representatives of General Lyon], Chesapeake contacted Alaska to determine its position. Alaska advised that the revised offer price of \$100 per share was too low and that a fair price would be between \$108 and \$126 per share. Shortly after that conversation, Chesapeake agreed to tender its shares at \$109 per share, which became the final tender offer price.¹⁵

¹⁴ DeMarco Aff., ¶¶ 7-10.

¹⁵ *Alaska Electrical Pension Fund*, 941 A.2d at 1014.

In addressing this possibility, the Court relies upon Mr. Long's testimony as the lead representative of Chesapeake. Mr. Long has no recollection of talking with Alaska's counsel, although he remembers conversations with representatives of Lyon Homes, Lehman Brothers, and Morgan Stanley.¹⁶ Mr. Long testified that Chesapeake's view of the proper valuation of Lyon Homes was based on its own analysis, and that he did not rely upon someone else's analysis.¹⁷ If a conversation occurred between Alaska's counsel and Chesapeake—and the Court accepts that it did—there is no evidence suggesting that it had any impact or causal effect or that it conferred any benefit. Indeed, the opposite inference would be more reasonable based upon Mr. Long's testimony. That Mr. Long fails to remember the conversation suggests it was of no import. After reviewing Mr. Robbins's memorandum of April 26, 2006, memorializing the conversation with Mr. Long, it is evident that Mr. Long already recognized that the \$100 per share price was insufficient prior to any contact with Alaska's counsel.¹⁸ When coupled with Mr.

¹⁶ Yoder Aff., Ex. F (Long Dep. at 55 (June 25, 2008)). Morgan Stanley was advising the special committee of Lyon Home's board of directors.

¹⁷ *Id.* at 17, 58.

¹⁸ Yoder Aff., Ex. I (Robbins Memo (Apr. 26, 2006) (Alaska's counsel notes that during the telephone conversation "Mr. Long expressed his view that the price was unfair and wished to know what our clients were doing *vis-a-vis* the Tender Offer.")).

Long's testimony about his own valuation efforts—which the Court finds to be extensive—it becomes clear that Alaska's counsel's opinions on a range of values were of no significance to Chesapeake.

The Court also notes that the testimony of Alaska's counsel, who participated in the telephone conversation with Mr. Long, does not show that Alaska contributed any benefit.¹⁹ Again, it is not Alaska's burden to show that it contributed any benefit. However, it does not refute the evidence rebutting a presumption of causation.

Although Chesapeake placed a phone call to Alaska's attorneys, nothing of substance can be taken from that fact. Just because a call is placed does not mean that the party placing the call is relying upon anything that occurs during the conversation; it may simply be a matter of courtesy to return a call. There is no evidence in the record of why Mr. Long called Alaska's counsel.²⁰ When one looks at the range of topics discussed, according to Alaska's counsel, in light of the short duration of the conversation—perhaps fifteen minutes—there is simply no

¹⁹ Yoder Aff., Ex. G (Robbins Dep. at 48-55 (June 19, 2008)) and Ex. H (Oddo Dep. at 39-43 (June 19, 2008)).

²⁰ The Court cannot conclude that the second increase was made any more likely because of the phone call from Mr. Long to Alaska's counsel. One may not infer that merely because "x" occurs after "y" that "y" was a cause of "x."

reason for rejecting Mr. Long's testimony to the effect that his actions and Chesapeake's actions were motivated by his own analysis and not in any way by the actions of Alaska or its attorneys. With the Court's acceptance of this testimony as credible, the presumption in favor of Alaska has been successfully rebutted.²¹

* * *

Alaska complains about a failure of the Defendants to meet their discovery obligations.²² They point to the deposition of General Lyon. That exchange is so confusing that it is difficult, if not impossible, to assess blame and is certainly not the basis for drawing the negative inference Alaska seeks.²³ Moreover, if there was a problem with the discovery, the appropriate course would have been to seek the Court's assistance in resolving it. After reviewing the deposition transcript,²⁴ the Court does not perceive how the discovery dustup would have affected the fundamental fairness of this proceeding or the ability of Alaska to pursue the factual questions that must be answered.

²¹ See *Grimes v. Donald*, 791 A.2d 818 (Del. Ch. 2000) (affidavit sufficient evidence to rebut causal presumption).

²² Alaska's Post-Remand Suppl. Br. in Suppl. of Fee Appl. at 10-13.

²³ *Id.* at 19 n.19.

²⁴ *Oddo Aff.*, Ex. 5 (General Lyon Dep. (Aug. 11, 2008)).

* * *

In sum, the Court finds that Defendants and the Delaware Plaintiffs have rebutted the presumption that Alaska and its attorneys were a cause of the second price increase. Alaska and its attorneys did not in any way contribute to the higher price.

Accordingly, Alaska's application for an award of fees and expenses is denied. The earlier award to counsel for Delaware Plaintiffs is, to the extent that it may be necessary, reconfirmed for the reasons previously given.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K