

COURT OF CHANCERY  
OF THE  
STATE OF DELAWARE

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Re: *Norberg v. Security Storage Company of Washington*  
C.A. No. 12885-VCN  
Date Submitted: August 1, 2012

Dear Counsel:

This protracted class action litigation, brought by a former minority shareholder in 1993 to challenge the freeze-out merger of Security Storage Company of Washington (“Security Storage” or the “Company”) was settled in 2008.<sup>1</sup> Members of the Class—essentially all of the minority shareholders<sup>2</sup>—were to receive \$10 per share for an aggregate recovery of approximately \$145,000.

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<sup>1</sup> Although the initial plaintiff’s claim was eventually dismissed, three other former shareholders were allowed to intervene as Plaintiffs in 2001; they would become representatives of the Class.

<sup>2</sup> Order Certifying the Class (Oct. 15, 2008) ¶¶ 1-2.

This matter is now before the Court because only a relatively small fraction of that amount—a little less than twenty-five percent—was ever paid out.<sup>3</sup>

The order scheduling the settlement hearing directed that notice be provided “to all holders of record of common stock of Security Storage as of February 3, 1993.”<sup>4</sup> The Stipulation of Settlement,<sup>5</sup> incorporated into the final judgment, provided that payment would be made to those Class members who had submitted,<sup>6</sup> or would submit, a Form W-9 and who either had surrendered, or would surrender, their stock certificates (or provide an affidavit of lost stock certificate). Final judgment was entered on October 15, 2008.<sup>7</sup> The class members had until December 31, 2000, to submit the necessary documentation.<sup>8</sup>

The Stipulation of Settlement, signed by counsel for the parties and approved by the Court, could, especially with the benefit of hindsight, have been

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<sup>3</sup> The current debate is framed by Plaintiffs’ Motion for an Order Requiring the Filing of a Certified and Audited Report of Claims Administration, for an Accounting of Settlement Proceeds, and Other Relief.

<sup>4</sup> Order Pursuant to Court of Chancery Rule 23 (Aug. 12, 2008) ¶ 6.

<sup>5</sup> Stipulation and Agreement of Settlement (July 29, 2008) ¶ 1.

<sup>6</sup> Although the drafters of the Stipulation of Settlement seemed to have thought that W-9 forms had been obtained by the Company in 1993, that understanding was largely inaccurate. Affidavit of Charles Lawrence (June 21, 2012) ¶¶ 2, 5.

<sup>7</sup> Order and Final Judgment (Oct. 15, 2008).

<sup>8</sup> Stipulation of Settlement ¶ 1(b).

more specific about the Company's responsibilities with respect to distribution of the settlement proceeds, in particular, the actions to be taken to locate the former shareholders entitled to participate in the settlement. The order suffers from something of a perverse incentive: the fewer claims submitted and the fewer former shareholders paid, the more money the Company retains.

The Company was not under any specific duty to track down former shareholders who were members of the Class from 1993—or their heirs.<sup>9</sup> Yet, given the length of time from the merger in 1993 until the settlement in 2008—a delay for which there is plenty of blame to go around—it was not reasonable simply to rely upon an approximately fifteen-year old shareholder list when more recent and, thus, more accurate information was held by the Company and appears to have been readily available.

In short, the Company should have used the best information reasonably available to it to carry out its task—which it assumed under the terms of the

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<sup>9</sup> It did not agree to undertake that effort, and, perhaps, the cost would have been disproportionate to the magnitude of the Class's total recovery.

Stipulation of Settlement—to distribute the settlement proceeds.<sup>10</sup> This is both a reasonable (but, admittedly, not the only) reading of the intent of the settlement agreement and the implementing order and a practicable resolution of a debate for which there is no (or none the Court has discerned) clearly right answer.<sup>11</sup> The cost to the Company is not disproportionate. Perhaps a review of the Company's own information will allow for distribution to a greater number of entitled former shareholders.<sup>12</sup>

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The Plaintiffs argue that the unclaimed funds should escheat to the State of Delaware (and not remain with Security Storage for its benefit). The text of the

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<sup>10</sup> It may be that Plaintiffs' counsel has more current information about some unpaid Class members than does the Company. If so, that information should be shared with the Company.

<sup>11</sup> Although the Plaintiffs sought a Court-ordered accounting, the substance of the information to be gleaned from that reporting was provided in the Affidavit of Theresa Collins (June 25, 2012). The problem is simple: by 2008, many of the shareholders had moved or passed away and, thus, a 1993 list of shareholder addresses was doomed to produce disappointing results.

Class members whose shares were held in a depository account also were significantly missed in the 2008 effort. Whether that specific shortfall also was caused by similar factors is unclear. Nothing in the settlement papers, however, supports a reading that Security Storage is somehow obligated to resolve the issues associated with the shares held in a depository account.

<sup>12</sup> The Court acknowledges that the cost of the additional notice directed to the updated list of unpaid Class members, the processing of any resulting claims, and the distribution of additional funds was not part of the settlement bargain. The burden of paying the Class members was accepted by the Company, and, because of the failure of the disbursement process agreed to, the sale constitutes an additional cost most fairly borne by the Company.

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Stipulation of Settlement requires submission of documentation by the class members in order to be paid and, thus, this was, in essence, a “claims-made” payment arrangement. This is also confirmed by the recitation by counsel for Defendants of the history of the process of negotiating the settlement.<sup>13</sup> Thus, no fund was created that would be subject to escheat if it were not completely disbursed to the shareholders.

**IT IS SO ORDERED.**<sup>14</sup>

Very truly yours,

*/s/ John W. Noble*

JWN/cap  
cc: Register in Chancery-K

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<sup>13</sup> Affidavit of Mary Catherine Roper (June 4, 2012) ¶¶ 5-7.

<sup>14</sup> The Court would expect that additional steps consistent with this Letter Opinion could be accomplished within sixty days. If counsel believe that a more comprehensive implementing order would be appropriate, they should confer and then advise the Court accordingly.