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Of Attorneys for Certain Sunwest Investors.

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

SECURITIES AND EXCHANGE  
COMMISSION,

Plaintiff,

v.

SUNWEST MANAGEMENT, INC.; et al.,

Defendants,

Case No.:09-06056-HO

DECLARATION OF PAUL R.J.  
CONNOLLY IN SUPPORT OF  
PETITION AND STATEMENT FOR  
ATTORNEY FEES AND COST BILL  
SUBMITTED BY THE LAW OFFICE OF  
PAUL R.J. CONNOLLY'S ATTORNEYS  
FOR SUNWEST INVESTORS/THIRD-  
PARTY CLAIMANTS

I, Paul R.J. Connolly, hereby declare:

**INTRODUCTION.**

1. My law firm and I are attorneys representing the Sunwest Investors / Third-Party Claimants in the Sunwest litigation. I make this Declaration based on personal knowledge and in support of my Firm's Petition and Statement for Attorney Fees and Cost Bill. On behalf of this firm, I have been primarily responsible for prosecuting third-party claims on behalf of Sunwest Investors for the last two and one-half years.

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**EXPERIENCE.**

2. After serving as a United States Army Intelligence Officer, I graduated from the Georgetown University Law Center in 1974. I served as a law clerk for United States Court Judge Oren R. Lewis, while becoming a member of the Virginia and District of Columbia Bar. Then I undertook to conduct political science research in judicial administration for the Federal Judicial Center, the Administrative Office of U.S. Courts and the American Bar Association. I have published numerous articles and papers on the subject of judicial administration and case management.

3. Upon moving to Oregon, and becoming a member of the Oregon State Bar in 1984, I joined the Salem law firm of Churchill, Leonard, Brown and Donaldson, becoming a partner in 1988. Subsequently, I joined with five of its partners to found the firm of Donaldson, Albert, Tweet, Connolly, Hannah and Muñiz.

4. In 1997, I founded my own firm that currently includes two associate attorneys, Kevin Jacoby and Tyler Malstrom, as well as several experienced paralegals, legal assistants and law clerks. We also utilize the legal services of some contract attorneys.

5. During my legal career in Oregon, I have developed a substantial civil litigation practice involving the resolution of business and complex commercial disputes. I have regularly appeared in state and federal court in Oregon representing both plaintiffs and defendants. I have tried numerous cases to judges and juries over the past 26 years.

6. My litigation clients over the years have included state and national banks, farm credit banks, credit unions, savings and loan associations and national and state corporations, schools, a school district and many local businesses.

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7. I regularly represent farmers and processors in a variety of disputes entailing litigation, arbitration and mediation. One major piece of litigation that I brought on behalf of the farm community was representing approximately 200 vegetable and fruit growers in defending avoidance and preference actions brought by the trustee in the Agripac food processor bankruptcy. Another major action was representing approximately 180 farmers in a lien foreclosure and collection action against the Bird'sEye Food Company and its subsidiary and involving the National Bank of Cooperatives, with litigation in New York and Oregon, in U.S. District Court, U.S. Bankruptcy Court and State Court. Both litigations resulted in highly successful but confidential settlements on behalf of the farmers.

8. From 2007 through 2009, I successfully represented over 100 of Oregon Public Employee System Retirees in obtaining compensation from PERS for its erroneous application of tax withholding from retiree benefits. Working on a team with skilled colleagues in my office, I was able to unravel a complicated taxation issue and demonstrate that the retirees were entitled to relief. I was appointed as class counsel by the Marion County Circuit Court, and my firm was responsible for communicating with hundreds of putative class members, litigating claims, and administering a negotiated settlement resulting in payment of claims to nearly 100 class members. This experience, coupled with the Agripac and Bird'sEye litigation referenced above, prepared my firm to deal with the administrative burden of representing the interests of hundreds of clients in a cost-effective manner.

9. Prior to my litigating the claims for Sunwest Investors, I have successfully litigated several securities cases. In addition, we have successfully litigated numerous business cases in federal and state court and at the Court of Appeals. Indeed, our broad

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business litigation practice provides a wide range of legal experience on numerous aspects of business issues that most litigation specialists do not possess.

10. In 2001, as attorney for the Oregon Republican Party, I led the principal litigation in the Oregon Supreme Court opposing the legislative redistricting plan implemented by the Oregon Secretary of State.

11. In 2004, I was nominated by the Oregon Republican Party to be its candidate for Attorney General, running a spirited issue-oriented campaign to replace the incumbent.

12. Over the course of my twenty-six years of practice in Oregon, I have prided myself and my firm on contributions to the Salem community. I serve on the Board of Directors for the YMCA, on the Board of Directors of Willamette Heritage Center (recently as its president), and on the Board of Directors of the Salem Catholic Schools Foundation. I am a co-founder of Blanchet Catholic School, a college preparatory Catholic high school and mid-high in Salem. My firm regularly contributes free-of-charge corporate and human resource legal services to those non-profits, as well as others, including the St. Vincent de Paul Society. The experience gained from the work my firm and I have done for these community-based entities has brought value to the non-profits and the Salem community.

13. In addition, Kevin Jacoby and Tyler Malstrom are both active members of Salem, Oregon Rotary Clubs. Since much of the legal fees incurred pursuing third-party claims by this firm was spent by Kevin Jacoby and Tyler Malstrom, I would also like to briefly outline their legal backgrounds.

- a. Kevin Jacoby joined my firm in 2007 as a recent graduate of Willamette University College of Law. In that time, Mr. Jacoby has been a key member of our legal team, quickly distinguishing himself litigating complex business

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claims, including securities claims. His litigation skills and the value he brings to the Sunwest cases as a litigation associate saved clients considerable legal expenses and increased their individual recoveries. Mr. Jacoby is also committed to our firm's philosophy of public service, providing skilled legal services to local non-profits and serving the community as secretary of Mid-Valley Pop Warner Football & Cheer, and participating as a member of the Salem Downtown Rotary.

- b. Tyler Malstrom is a 2009 graduate of Willamette University College of Law and joined the firm as a law clerk before being hired as an associate upon graduation. Mr. Malstrom is a valuable member of our firm's Sunwest litigation team, with his primary legal work centered around claims against broker-dealers. Since joining the Oregon State Bar, Mr. Malstrom has also committed himself to serving the Salem community as a board member for the South Salem Neighborhood Association, volunteer for Neighborhood Harvest of Salem, and participating as a member of Salem Creekside Rotary.

14. I have endeavored to remain open to mediation of all claims while pressing down on the litigation throttle. In this litigation, my firm has promoted the settlement of claims to avoid fees and the eventual settlement recoveries reflects a highly advantageous result for my clients. As an example in the third-party claims, we limited our attendance at witness interviews and in analyzing documents produced by the law firms when other lawyers provided those services because to do so would drive up client costs unnecessarily.

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**DESCRIPTION FOR CLAIM OF FEES AND COSTS**

15. In our prosecution of third-party claims for Sunwest Investors, the firm rendered legal services with the value of \$290,598.50 to date. A detail of the time transactions is set forth as Exhibit 1 attached hereto, attached in both .pdf and .csv formats. A summary by attorney of time and rate per hour claimed is as follows:

WHO	TOTAL TIME	Rate	Amount
PRJC	241.9	\$450.00	\$108,855.00
KJJ	217.9	\$230.00	\$50,117.00
TPM	142.7	\$230.00	\$32,821.00
CJM	32.7	\$230.00	\$7,521.00
MGM	11.1	\$230.00	\$2,553.00
Law Clerk	221.9	\$165.00	\$36,613.50
Paralegal	246.2	\$165.00	\$40,623.00
Secretarial	229.9	\$50.00	\$11,495.00
			<b>\$290,598.50</b>

16. This Firm has also spent the sum of \$11,945.79 for filing and witness fees, legal expenses, costs and disbursements in pursuing these third-party claims, as detailed on Exhibit 2, which is provided in both .pdf and .csv formats. These expenses and costs are normally billed directly to the client and are not overhead expenses already reflected in our hourly rate or fee. These “nontaxable costs” are recoverable under the rule of *Robinowitz v. Pozzi*, 127 Or App 464, 470, 872 P2d 993 (1994); and *Willamette Production Credit Ass’n. v. Borg-Warner Acceptance Corp.*, 75 Or App 154, 159, 706 P2d 577 (1985), rev. den 300 Or 477 (1986). For those costs that have been paid by my firm’s clients, my firm will reimburse the clients for these costs.

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17. Exhibit 3, attached hereto, is a summary of the hours and costs sought grouped by case and matter.

18. Exhibit 4, attached hereto, is a summary of the various categories of costs and their corresponding amounts that comprise my firm's cost bill.

19. All the time incurred and costs expended in the litigation were reasonable and necessary. My firm has endeavored to represent the investors in a cost efficient and economical manner. We represented investors both on an hourly and on a contingency fee basis, giving the clients the choice of fee arrangements. Throughout this litigation, I assigned legal work to capable associates and staff in a manner designed to reduce the costs of services rendered to clients.

20. Based upon the factors identified here and the fees charged by other attorneys in the third-party litigation, the reasonable hourly rate for Paul Connolly is \$450.00, for Kevin J. Jacoby, Tyler P. Malstrom, Christopher J. Mertens and Matthew G. Matrisciano is \$230.00, for law clerks and paralegals is \$165.00 and for secretaries is \$50.00. These hourly rates are reasonable for attorneys and support staff with comparable skills, reputation and experience. These rates are higher than the firm's customary rates which are for Paul Connolly is \$250.00, for Kevin J. Jacoby is \$175.00, for Tyler P. Malstrom, Christopher J. Mertens and Matthew G. Matrisciano are \$125.00, for law clerks is \$50.00, for paralegals are \$75.00 and for secretaries are \$35.00. However, my firm should be compensated at the same hourly rates as other third-party claims attorneys because we have provided equal service and equal benefit in effectuating the settlements in the same environment as our Portland counterparts. Otherwise, an anomaly would result, whereby for example, the paralegal work in the Portland-area firms would be paid

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at a rate that is \$50-\$70 more per hour than experienced and capable associate attorneys from my firm. I base this opinion upon my staff's contribution to the litigation process, our legal analysis of theories of liability and damages, our considerable contribution of time and talent to the litigation and mediation process, my discussion with business litigators about hourly fee rates, my experience in submitting and reviewing many fee petitions and testimony by experts, including myself, in contested attorney fee hearings.

21. The Court may also consider ORS 20.075 and the factors checked below in determining a reasonable attorney fee award:

- The novelty and difficulty of the questions involved.
- Skills requisite to perform the legal services properly.
- The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- Fees customarily charged in the locality for similar legal services.
- The amount involved and the results obtained.
- The time limitations imposed by the client or by the circumstances.
- The nature and length of the professional relationship with the client.
- The experience, reputation, and ability of the lawyers performing the services.
- Whether the fee is fixed or contingent.

**THE LEGAL SERVICES PROVIDED.**

22. My firm began its representation of various Sunwest Investors during the summer of 2008, shortly after Sunwest ceased making its rental and interest payments to tenant in common and other investors. My firm's initial clients consisted of a group of

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investors in the Emerald Square assisted living facility in Oklahoma and the Park Place assisted living facility in South Carolina. Eventually, the Law Firm began receiving multiple inquiries from multitudes of other Sunwest investors in other Sunwest-related projects.

23. My firm's legal strategy from the outset went down two parallel but independent tracks – one track compiling information for investors on possible work-outs with Sunwest, lenders and others, and the other track investigating possible claims for damages against Sunwest, its various entities, and third parties such as law firms, brokers and other professionals. For the most part, my firm's Sunwest investor clients were given the option of taking one or both tracks, each with its own fee agreement.

24. My firm is not seeking compensation for time and costs associated with possible work-outs or in their representation of various client interests in the SEC or Stayton Bankruptcy cases.

25. My firm's first comprehensive lawsuit that named Davis Wright Tremaine and Tim Dozois as a defendant was filed on October 30, 2008 in *Davis' Carnegie Village, LLC et al. v. First American Title Company, et al.*, Marion County Case No. 08C24198. From the outset of this case, the my firm's strategy was to deal with the liability of DWT primarily, focusing most discovery efforts at that defendant and dealing with other defendants only as necessary.

26. In the course of discovery in the *Carnegie Village* litigation, I learned that DWT had excess coverage in the amount of \$40 million, and that the policy was set to lapse on December 31, 2008, which was only a matter of weeks away. Therefore, as part of our representation for all of our Sunwest investor clients, we began the process of getting consent to present claims to DWT and its insurance carriers before the expiration

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of the policy.

27. We recognized that there was a distinct possibility that the policy could be cancelled at its expiration and any claims that were tendered after December 31, 2008 would be denied. As this was explained to our then-current clients, we received numerous requests from other Sunwest investors to be included in the our claim letter. We agreed to present such claims on behalf of these new clients on a limited basis – we would present the claims for a flat fee, with subsequent representation to be negotiated at a later date. As a result of this effort, which involved significant administrative burden and expense during the 2008 holiday season, we presented claims from approximately 370 Sunwest investors to the attorneys representing DWT on December 30 and 21, 2010, which was supplemented on January 2, 2009.

28. During the first six months of 2009, we continued to exchange discovery with the attorneys representing DWT, including gathering and compiling discovery from our various investor clients as requested by DWT. Also during this time, we began filing additional lawsuits against DWT, K&L Gates, certain brokers and others. These efforts continued until approximately June 2009, when, under the auspices of the SEC Receivership case, an agreement was reached between the Receiver and attorneys for investor plaintiffs to allocate responsibilities between and among the various claimants attorneys, in an effort to avoid duplication of efforts and further erode DWT's wasting policy. Also at that time, a mediation protocol had been set up that had the effect of staying any direct activity against DWT in the litigation. All of these developments had to be communicated to the our numerous clients, which was done primarily by email in an attempt to preserve resources and provide information in a relatively cost-effective manner.

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However, considerable time was expended answering individual questions from clients via telephone and email.

29. The cases that my firm filed on behalf of investors against Davis Wright Tremaine are as follows:

*Davis' Carnegie Village, LLC, et al. v. Davis Wright Tremaine LLP, et al.* Marion County Circuit Court Case No. 08C24198

*C Chinn's Chestnut Hill, LLC, et al. v. Davis Wright Tremaine LLP, et al.* Marion County Circuit Court Case No. 09C12601

*Allyn's Crown Pointe, LLC, et al. v. Davis Wright Tremaine LLP, et al.* Marion County Circuit Court Case No. 09C12355

*Henvy's Emerald Square, LLC, et al. v. Davis Wright Tremaine LLP, et al.* Marion County Circuit Court Case No. 08C26132

*Davis' Homesteads at Newtown, LLC, et al. v. Davis Wright Tremaine LLP, et al.* Marion County Circuit Court Case No. 09C18135

*C Thomas' Framatone, LLC, et al. v. Davis Wright Tremaine LLP, et al.* Marion County Circuit Court Case No. 09C14130

30. In all of the above cases, Davis Wright Tremaine was not the only defendant. My firm is not seeking compensation for time or costs devoted solely to claims against other defendants, and for any time spent that benefitted all claims, the time was reduced accordingly on Exhibit 1 in proportion to the number of defendants.

31. In or around October 2009, after considerable negotiations, the attorneys for DWT and the plaintiff investor counsel reached an agreement in principle on a global settlement of all Sunwest-related claims. At that time, my firm expended significant time and effort explaining the terms of the settlement to clients, conferring with opposing and aligned counsel regarding the proper form of settlement agreement, and ensuring that appropriate notifications were submitted to the courts in which the litigation was pending,

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including filing motions to stay and in some cases notices of dismissal without prejudice. We also expended significant energies in getting its clients' signatures to the settlement.

32. My firm also presented claims for approximately 50 investors to K & L Gates, also in December 2008, and filed two lawsuits against that law firm in early 2009: *Momyer's Overlook, LLC, et al. v. K & L Gates LLP, et al.*, Marion County Case No. 09C16149 and *Bolster's 9<sup>th</sup> & Rose, LLC, et al. v. K & L Gates LLP, et al.*, Marion County Case No. 09C14990. This litigation required a significant amount of motions practice, as well as extensive document discovery from the our clients. However, the litigation was stayed in early 2010 as the global mediation process under this Court began to take shape.

33. During the K & L Gates mediation, the attorneys representing K & L Gates demanded interviews with certain investors in order to test the factual underpinnings for the claims against that law firm. Two of my clients were chosen for interviews, and the my firm spent significant time gathering discovery, preparing the clients for the interviews, and attending the interviews.

34. My firm also represents 16 clients in litigation against several broker-dealers. In the summer and fall of 2010, we filed lawsuits against these broker-dealers and their affiliated entities, which were almost immediately mediated and for which an agreement in principal was reached in August 2010. We participated in two rounds of mediations and in several conference calls thereafter. The cases that my firm filed against brokers are as follows:

*Tullus' Glenellen, LLC, et al. v. Alexander Partners, et al.* Marion County Circuit Court Case No. 10C18058

*Meeker's Crown Pointe, LLC, et al. v. Capwest Securities, Inc., et al.* Marion County Circuit Court Case No. 10C18057

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*Allen's Georgian Place, LLC, et al. v. Robert H. Zink and Zink, Inc.* Marion County Circuit Court Case No. 10C18056

*Shafer's Neilsen Complex, LLC, et al. v. Alex Rhoten* Marion County Circuit Court Case No. 10C18051

*Henvy's Emerald Square, LLC, et al. v Alex D. Rhoten* Case No. 09C13277

35. Based on all the facts and circumstances in this case, this Firm respectfully requests an award of reasonable and necessary attorney fees incurred in our work on behalf of Sunwest Investors these last two years in the sum of \$290,598.50, plus reimbursement of our out-of-pocket expenses, costs and disbursements in the sum of \$11,945.79. While this Firm was but one member of the team which with our mediators gained over \$55 million in third-party settlements for the benefit of Sunwest Investors, I respectfully suggest our Firm contributed significantly to the group effort and helped achieve a result far greater than our incurred fees and expenses.

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury. This Declaration was signed in Marion County, Oregon on the 7<sup>th</sup> day of January, 2011.

DATED this 7<sup>th</sup> day of January, 2011.

By /s/ Paul R.J. Connolly  
Paul R.J. Connolly, OSB #844090

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