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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

SECURITIES AND EXCHANGE COMMISSION,

Case No. _____

Plaintiff,

vs.

SUNWEST MANAGEMENT, INC., CANYON
CREEK DEVELOPMENT, INC., CANYON CREEK
FINANCIAL LLC, and JON M. HARDER,

Defendants,

and

DARRYL E. FISHER, J. WALLACE GUTZLER,
KRISTIN HARDER, ENCORE INDEMNITY
MANAGEMENT LLC, SENENET LEASING
COMPANY, FUSE ADVERTISING, INC., KDA
CONSTRUCTION, INC., CLYDE HAMSTREET, and
CLYDE A. HAMSTREET & ASSOCIATES, LLC,

Relief Defendants.

DECLARATION OF MICHAEL A.
FORTUNATO IN SUPPORT OF
PLAINTIFF SECURITIES AND
EXCHANGE COMMISSION'S *EX*
PARTE APPLICATION FOR
TEMPORARY RESTRAINING ORDER
AND ORDER TO SHOW CAUSE RE
PRELIMINARY INJUNCTION

I, Michael A. Fortunato, declare as follows:

1. I am a Staff Accountant in the Office of Enforcement of the San Francisco Regional Office of plaintiff Securities and Exchange Commission. I am licensed as a Certified Public Accountant in the State of California. I have personal knowledge of the fact set forth below, and if called as a witness, I could and would competently testify as follows:

2. Sunwest Management Inc., ("Sunwest") along with its principals Jon Harder and Darryl Fisher, manage over 200 senior living communities throughout the United States. "Sunwest Entities" refers to Sunwest, Darryl Fisher, Jon Harder and any of the senior living communities operated by Sunwest.

3. I have reviewed various documents for at least 30 Sunwest Entities, including general ledger reports, financial statements, banking records and trial balances for the period from January 1, 2006 through September 30, 2008. Based on my review of these documents, cash transfers were regularly made between Sunwest Entities and were recorded and tracked within the various cash, notes receivable and notes payable accounts maintained by Sunwest Entities.

4. I have also performed calculations to determine the proportion of Sunwest's senior living homes were operating at negative cash flow. I performed this calculation for each of the nine-month periods ended September 30, 2007 and September 30, 2008 using Excel files called "Portfolio Detail" produced by Sunwest for each of these periods. I counted the number of homes with negative net cash flow in each of these periods and compared that count to the total count of homes within the Portfolio Detail. For the nine-month periods September 30, 2007 and 2008, the percentage of homes operating at negative cash flow was 59 percent and 58 percent, respectively.

Cash Transfers and Accounting between Sunwest Entities—Generally

5. In accounting, a general ledger is the complete set of accounts established and maintained by a business and usually contains the balances in these accounts at some particular time.

A general ledger is maintained for each Sunwest Entity. Two general ledgers accounts are notes receivable and notes payable.

6. The term note receivable in an accounting context generally means an amount of money the holder of a note is **due from** an entity as a result of some transaction. Usually, the use of the term note implies that a promissory note or other type of financial instrument evidences the transaction. For example, a bank would record a note receivable from a borrower when a loan is made by the bank for the purchase of a home secured with a mortgage. Conversely, the term note payable generally means an amount of money **due to** an entity resulting from a transaction. Using the same example, a person or entity borrowing from a bank to purchase a home secured with a mortgage would record on its books and records a note payable amount due the bank.

7. At Sunwest, the terms notes receivable and notes payable are used to describe the transfer of cash between Sunwest Entities. The transfers may or may not be documented by an actual note.

8. The general ledgers for the Sunwest Entities I reviewed maintain separate accounts for amounts due from other Sunwest Entities. Attached as **Exhibit 1** is a true and correct copy of the general ledger from one of the Sunwest Entities, Magnolia Gardens dated December 31, 2007. The accounts are listed on the general ledger under the caption notes receivable. The balances within the note receivable accounts represent the cumulative amount due from a particular Sunwest Entity. For example, under the notes receivable caption, there is a line item "N/R Arbrook" which carries a balance of \$45,000, the amount Arbrook owes Magnolia Gardens. As of December 31, the total amount of notes receivable from other Sunwest Entities due to Magnolia Gardens was \$465,328. To document the transfer of money from one property to another, the property sending the cash recorded the cash transfer as a note receivable on its balance sheet.

9. Conversely, the general ledgers for the Sunwest Entities maintain separate accounts for amounts due to other Sunwest Entities. The notes payable are shown under the heading Other Current Liabilities on the bottom of page 2 and carrying onto the top of page 3. **Exhibit 1.** The balances within the note payable accounts represent the cumulative amount due to a particular Sunwest Entity. For example, there is a line item "N/P Holiday Lane Estates" which carries a balance of \$90,000, the amount Magnolia Gardens owes Holiday Lane Estates. As of December 31, the total amount of notes payable to other Sunwest Entities from Magnolia Gardens was \$1,547,242. To the extent a property received funds (or the benefit of funds) from that transfer; the receiving property recorded a note payable on its balance sheet.

10. The term "journal entry" is one way of making accounting entries into general ledgers. At Sunwest, journal entries in the amount of the cash transferred between and among related entities are recorded in the books and records of the originating entity as a reduction to the cash general ledger account and as an increase to either the notes receivable general ledger account or as a reduction in an existing notes payable general ledger account. Conversely, a journal entry in the amount of the cash received is recorded in the books and records of the receiving entity as an increase to the cash general ledger account and as an increase to the transferring entity notes payable general ledger account or as a reduction in an existing notes receivable general ledger account.

11. Based on my review of documents denoted in paragraph 3, cash transfers made between and among affiliated entities are recorded as either increases or decreases in cash general ledger accounts combined with the recording of notes receivable and notes payable. Other than the 30 Sunwest Entities reviewed, in order to ensure that all related entity cash transactions are recorded consistently for all Sunwest Entities and for all cash transfers, a verified accounting would be needed.

12. In order to confirm that cash transfers were recorded as a notes receivable and notes payable, I looked to bank account reconciliations. A bank account reconciliation is a procedure

usually performed monthly by companies to ensure that individual cash transactions as reported by a bank are accurately recorded within cash general ledger accounts. The reconciliation generally includes a detailed listing of all cash receipts and disbursements made in a particular month. Each Sunwest Entity has its own separate bank account reconciliation which, in addition to receipts and disbursements from and to third parties, includes a detailed listing of transfers between it and other Sunwest Entities. In order to verify that cash transfers were recorded as a note receivable or payable, a sample of cash transfers were selected from the bank account reconciliation detailed listing and traced the transfer through to each Sunwest Entity respective general ledger.

Sunwest Entity Cash Transfer Detail Example

13. To illustrate how one Sunwest Entity records a cash transfer to another, the bank reconciliation is compared to the general ledger for that Entity. A true and correct copy of October 2007 bank account reconciliation for Magnolia Gardens' cash account, Bank of America account # XXXX-XXXX-7122 is attached as **Exhibit 2**. The second page of **Exhibit 2** lists a withdrawal on October 11, 2007 in the amount of \$40,000, "OLTXR TO ARBRK" indicating a transfer of cash out of Magnolia Gardens to Arbrook on October 11. To verify the withdrawals, the account detail is compared to Magnolia Garden's bank statement. A true and correct copy of the October 2007 Bank of America bank statement for the Magnolia Gardens' is attached as **Exhibit 3**. On the second page of **Exhibit 3** the item of \$40,000, "Online Banking Transfer to Chk 8402" dated October 11 confirms the withdrawal.

14. Magnolia Gardens recorded this cash transfer as a reduction of cash and as a note receivable due from Arbrook. A true and correct copy of the Magnolia Gardens general ledger as of October 31, 2007 is attached as **Exhibit 4**. Page 1 of **Exhibit 4** represents general ledger account number 01015-000-0 Bank of America Checking and has an entry of \$40,000 on October 31 using journal number "JE-000141". This JE designates a journal entry. The comment for this journal entry

is "XFER TO ARBROOK 10/11". The Ending Balance column of this page shows the running balance of this general ledger account and shows a \$40,000 reduction in the cash balance after posting this entry. The second page of **Exhibit 4** shows the recording of the \$40,000 note receivable from Arbrook resulting from the transfer to Arbrook of \$40,000 cash. These two entries are related because they contain the same journal entry reference number (JE-000141) and the debit equals the credit.

15. Arbrook's general ledger confirms that Arbrook recorded the cash it had received from Magnolia Gardens as a note payable. Attached as **Exhibit 5** is a true and correct copy of Arbrook's general ledger. Near the bottom of the first page of **Exhibit 5**, under the caption "N/P-Magnolia Gardens", a journal entry in the amount of \$40,000 (JE-000160) is recorded with the comment "October Cash Receipts".

16. In order to verify that Arbrook actually received the cash from Magnolia Gardens, I reviewed Arbrook's bank statement reconciliation. Attached as **Exhibit 6** is a true and correct copy of the October 2007 bank statement reconciliation for Arbrook's cash account, Bank of America account # XXXX-XXXX-8402. The sixth page of **Exhibit 6** details total deposits into this account of \$595,894. Included in the detail of is the October 11 deposit in the amount of \$40,000 with a comment, "OLTXR FR MAGNILA GN". The second page of **Exhibit 6** is a copy of the Bank of America Bank statement for October 2007 which also shows total deposits of \$595,894. Based on this review, Magnolia Gardens transferred \$40,000 to Arbrook.

17. Arbrook's cash general ledger account verifies that it recorded the \$40,000 cash received from Magnolia Gardens in its general ledger. Attached as **Exhibit 7** is a true and correct copy of the Arbrook general ledger for the period ending October 2007. The total amount of increases to the cash general ledger account was \$595,894, consistent with the bank statement

reconciliation. See Exhibit 6. Based on my review of Exhibit 7, it appears that the \$40,000 transfer received from Magnolia Gardens was recorded in the cash general ledger account.

Use of Harder and Fisher Cash Accounts to Facilitate Transfers

18. The documents produced by Sunwest indicate that separate general ledgers were maintained for at least two of the company's officers—Darryl E. Fisher (“DFE”) and Jon M. Harder (“JMH”). Similar to other Sunwest Entities, these general ledgers contain a listing of accounts and balances including cash general ledger accounts.

19. Among other transactions, these general ledgers are used to record transfers of cash from and to at least three separate bank accounts, one account held in the name of Darryl E. Fisher, Umpqua Bank account XXXXX9384, one account held jointly in the names of Jon M. Harder and Kristin P. Harder, Wells Fargo accounts XXX-XXX4517 (“JMH Bus a/c”) and one held in the name of Jon M. Harder account XXX-XXX8106 (“JMH Sec a/c”).

20. The accounting for cash transfers **out of** these three bank accounts is identical to the accounting for transfer of cash out of other Sunwest Entities; transfers of cash out of these accounts create a note receivable on the general ledgers of either Jon Harder or Darryl Fisher with the corresponding note payable recorded on the general ledgers of the Sunwest Entity receiving the cash.

21. Similarly, the accounting for cash transfers **into** these three bank accounts is identical to the accounting for transfers of cash into other Sunwest Entities; transfers of cash into these accounts create a note payable on the general ledgers of either Jon Harder or Darryl Fisher with the corresponding note receivable recorded on the general ledgers of the Sunwest Entity transferring the cash.

22. Cash moved through the Harder accounts before being transferred to other Sunwest Entities. Samples of large cash transactions occurring in May 2008 originating from Paragon Gardens, a Sunwest Entity, show this pattern. The selected transactions came from the May 2008

Paragon Gardens Wells Fargo Bank Statement and bank reconciliation. A summary of those transactions which I created is attached as **Exhibit 8**.

23. On May 8, 2008, First American Title Company wired \$465,000 into the Paragon Gardens bank account. Also on May 8, 2008, Paragon Gardens' Wells Fargo bank transferred \$365,000 account to the "JMH Bus" account, one of the Jon Harder accounts.

24. Paragon Gardens' general ledger verifies that Paragon Gardens recorded a reduction in its cash general ledger balance and reduced an outstanding note payable to Jon Harder for \$365,000.

25. The Jon Harder general ledger verifies corresponding journal entries in the amount of \$365,000 were made to increase the amount owed to Paragon Gardens and to increase its cash balance.

26. I also traced the movement of cash from the "JMH Sec account" to Sequoia Springs, Chestnut Lane, Oakridge, Spring Estates and Carriage House, all of which are Sunwest Entities, by reviewing each of these related entities respective bank account statements. This tracing is also shown on **Exhibit 8**. For example, on May 14, 2008, \$1,000,000 was wired from the JMH Sec account to Sequoia Spring.

27. Each of the general ledgers for these Sunwest Entities verifies journal entries made to record the increase in cash with corresponding increases in the amounts to Jon Harder.

28. Other than those transactions examined by me at **Exhibit 8**, a full accounting of cash transfers made through the JMH Bus and JMH Sec from and to other Sunwest affiliated entities would be needed to determine the full amount of Sunwest Entity cash transactions.

Transfers of Investor Proceeds—Paragon Gardens

29. Bank records obtained from Paragon Gardens, a Sunwest Entity, show Wire transfers in the amounts of \$465,000, \$775,638, \$200,000 and \$127,405 received by Paragon Gardens on May 8, May 14, May 19, and May 30, respectively, as shown on **Exhibit 8**.

30. **Exhibit 8** also shows the beginning bank statement balance of Paragon Gardens of \$3,341.38. My review of the Paragon Gardens bank statement shows that on May 6, 2008, one other deposit was made in the amount of \$171,600. The balance in this account after this deposit was therefore \$175,031.38. There were no other deposits into this account between May 1, and May 7, 2008.

31. **Exhibit 8** further shows that on May 8, 2008, the same day on which the \$465,000 wire transfer was received from First American Title Company, an online transfer was made to the "JM H Bus" account in the amount of \$365,000. The \$365,000 transfer could not have been made out of this account on this date but for the \$465,000 wire in from First American Title Company.

32. **Exhibit 8** further shows that on May 14, 2008, the same day on which the \$775,638 wire transfer was received from First American Title Company, an online transfer was made to the "JM H Sec" account in the amount of \$780,000. The \$780,000 transfer to could not have been made on this date but for the \$775,638 wire from First American Title Company. This is because the balance in the bank account was only \$15,274.84 based on my review of the May 2008 Paragon Gardens bank statement.

33. To show that nearly all proceeds from the Paragon Gardens offering received from First American Title Company were transferred to other Sunwest Entities, I included the total bank statement activity at the bottom of **Exhibit 8**. For example, the balance of cash remaining in the Paragon Gardens' bank account was only \$8,702 as of May 31, 2008 which means that it had transferred nearly all of the proceeds received from First American Title Company to other Sunwest Entities.

Use of Investor Proceeds—Copper Springs (Hobbs Senior Living)

34. In order to determine how the proceeds from the Copper Springs (Hobbs Senior Living) preferred membership solicitation were accounted for, I obtained and reviewed the general

ledger for Copper Springs Senior Living. Attached as **Exhibit 9** to this Declaration is a true and correct copy of an excerpt of the Copper Springs general ledger produced by Sunwest.

35. Based on my general understanding of investment closings, I would expect among other journal entries, a journal entry within the cash general ledger account. I scanned the entries within the cash general ledger accounts and noted journal entry number JE-000082 with a description of "RECORD CLOSING OF MEMBERSHIP PURCHASE" posted on January 31, 2008 within the "WF BANKING-CONST CHECKING-1624" general ledger account **Exhibit 9, pg 3**. The journal entry increased the cash general ledger account by \$150,000. The description of this journal entry, along with the increase in the cash account, indicates that a closing took place and that investor funds were received for the closing.

36. I further reviewed **Exhibit 9** to find other journal entries bearing the same journal entry number and description. Beginning on the bottom of page 4 and carrying over to page 5, there are four journal entries within the "N/R-KDA Construction, Inc." account in the amounts of \$60,000, \$100,000, \$160,000, and \$275,000. The journal entries all bear the same journal entry number (JE-000082), description ("RECORD CLOSING OF MEMBERSHIP PURCHASE") and date (1/31/08) which, based on my experience, means that are all related to the same transaction. These journal entries increased the balance within the "N/R-KDA Construction, Inc." which means from an accounting perspective, KDA Construction, Inc. owes Copper Springs these amounts. Based on the way these journal entries were recorded, proceeds from the closing went to KDA Construction, Inc. with those proceeds now owing back to Copper Springs.

37. Page 5 of **Exhibit 9** contains an account entitled "N/R-Jon Harder". I reviewed the journal entries in this account and noted an entry dated 1/31/08, increasing the "N/R-Jon Harder" account by \$400,000. The identifying characteristics for this journal entry, namely, the description ("RECORD CLOSING OF MEMBERSHIP PURCHASE"), journal entry number (JE-000082) and

date (1/31/08) are the same as the entries discussed in paragraphs 34 and 35 above which, appear to relate to the same transaction. Because a \$400,000 amount was recorded as a receivable from Jon M. Harder, in substance, this means that Copper Springs is owed this amount. Additionally, based on the description of the journal entries, these funds originated from membership investment proceeds.

Use of Proceeds from Refinancing Debt

38. To determine how refinancing proceeds were accounted for at Sunwest, I selected the refinancing of Plaza at Sun Mountain, a Sunwest Entity which occurred on May 31, 2007. Attached as **Exhibit 10** to this Declaration is a true and correct copy of a First American Title Insurance Company of Oregon Final Settlement Statement for Plaza at Sun Mountain produced by Sunwest.

39. There are several characteristics on **Exhibit 10** which indicate this transaction is a refinancing transaction. First, under the "Borrower Credit" column, there is an amount of \$12,797,000 with an associated description of "New Loan to File-Column Financial, Inc." Second, further down page 1 of **Exhibit 10**, there is a caption entitled "Payoff Loans". Within the "Borrower Charge" column an amount of \$3,233,001 is shown with an associated description of, "Principal Balance Loan#114404-Merrill Lynch Business Financial Services", which indicates that Merrill Lynch was the holder of the note and that they would be paid with proceeds from the new loan.

40. At the bottom of page 1 begins a caption entitle "Disbursements Paid" which shows the entities and individuals and related disbursement amounts. Near the bottom of page 2, there is a line item entitled "Net Proceeds of Loan to Vegas Assisted Living" with an associated amount of \$2,284,000. The \$2,284,000 is the amount due back to Vegas Assisted Living d/b/a/ Plaza at Sun Mountain.

41. I reviewed the May 2007 Wells Fargo Banks statement for account# XXX-XXX5116 in the name of Vegas Assisted Living d/b/a Plaza at Sun Mountain and traced the \$2,284,000 into the account as a wire transfer originating from First American Title Company. The wire was received at

Wells Fargo on May 31, 2007. While reviewing the Plaza at Sun Mountain Wells Fargo Bank statement, I noted approximately \$1.1 million of online transfers out with descriptions indicating they were to other Sunwest Entities.

42. **Exhibit 11** is a schedule I created to trace the \$2,284,000 refinancing proceeds from **Exhibit 10**. I created this schedule based on my review of bank statements for the May 2007 time period for each respective Sunwest related entity shown on **Exhibit 11**. The \$2,284,000 proceeds from the refinancing were, in part, transferred to other Sunwest affiliates. For example, on May 31, 2007, \$912,371 was transferred to the "JMH Bus Acc." From the "JMH Bus" account, \$160,000 was transferred to Kensington Green, \$120,000 was transferred to Newtown Senior Living and \$40,000 was transferred to Laurel Estates.

43. Other than those transactions analyzed at **Exhibit 11**, a full accounting of the sources and uses of refinancing proceeds would be needed to determine the ultimate use of refinancing proceeds by Sunwest and Sunwest Entities.

Transfers of Cash to Harder's Joint Personal Bank Account

44. I obtained and examined copies of bank monthly bank statements in for the period from January 1, 2006 through November 30, 2008 for Wells Fargo Account number XXX-XXX3578 in the name of Jon M Harder, Kristin M. Harder POD Jon M. Harder Living Trust ("Harder Personal Account"). **Exhibit 14** is a schedule of deposits and other credits I created by examining the Harder Personal Account monthly bank statements.

45. The column entitled "Harder Payroll" represents direct deposits made into this account from Sunwest. The transaction description within the bank statement for the "Harder Payroll" column states "Sunwest Payroll Jon M. Harder" which indicates these as payroll direct deposits. For 2006, 2007 and for the 11 months ended November 30, 2008, "Harder Payroll" amounts of \$44,738, \$42,356 and \$38,968, respectively, were deposited into the Harder Personal Account.

46. The column entitled "Deposits Other than Transfers" is essentially deposits of checks. These amounts were obtained from the Harder Personal Account monthly bank statements by taking total deposits on the bank statements less electronic transfers. For 2006, 2007 and the 11 months ended November 30, 2008, "Deposits Other than Transfers" into the Harder Personal Account were \$1,236,822, \$943,040, and \$528,460, respectively.

47. The amounts included in the columns entitled "Transfer in from JMH Bus Acc" and "Transfer in from JMH Sec Acc" represent online transfers made from the "JMH Bus" account and the "JMH Sec." account into the Harder Personal Account. Amounts transferred into the Harder Personal Account from the JMH Bus account are \$370,000, \$414,400 and \$430,000 for the years ended 2006, 2007 and 11 months ended November 30, 2008, respectively. The amounts transferred into the Harder Personal Account from the JMH Sec. account are \$12,000 and \$220,000 for the year ended December 31, 2007 and 11 months ended November 30, 2008.

48. To determine the source of the amounts in the "Deposits Other than Transfers" amounts, I obtained and reviewed a sample of deposit source documents from Wells Fargo Bank for deposits made in September 2007. **Exhibit 12** attached to this Declaration is a true and correct copy of one of those documents drawn on Victory Hills Senior Living, a Sunwest Entity, dated 9/28/07 and made payable to Jon M. Harder in the amount of \$40,000. This check which was deposited into the Harder Personal Account on 9/28/07.

49. Attached as **Exhibit 13** to this Declaration is a true and correct copy of the financial statements for Victory Hills Senior Living produced by Sunwest. Page 5 of these financial statements show that for the month ended September 30, 2007, Victory Hills Senior Living had Net Income from Operations of \$19,274. After debt service and TIC expense is taken into account, the \$19,274 changes to a net loss before depreciation expense of (\$70,880), which means that Victory Hills was cash flow negative in September 2007.

50. Based on these financial results, it appears that Victory Hills' financial results were insufficient for it to cover debt service, lease expense and TIC expenses.

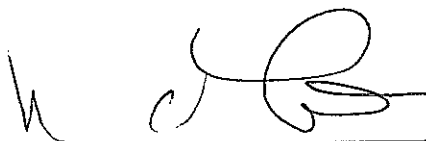
51. A more complete accounting of all cash received into the Harder Personal Account is needed to determine total amounts received from all sources.

Transfers of Cash into Other Sunwest Affiliated Companies

52. Banking records produced by Sunwest and Wells Fargo verify that payments of cash are made to KDA Construction, Inc., Fuse Advertising, Inc., Encore Indemnity Management, LLC and Senenet Leasing Company. Each of these entities is affiliates of Sunwest.

53. Attached as **Exhibit 15** to this Declaration are true and correct copies of cancelled checks produced by Wells Fargo. **Exhibit 15** is a sampling of checks payable to each Sunwest's affiliates and predominantly drawn on the JMH Bus account.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed on February 28, 2009 in San Francisco, California.



Michael A. Fortunato