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Of Attorneys for Sunwest Investors/Third-Party Claimants

**IN THE UNITED STATES DISTRICT COURT**

**DISTRICT OF OREGON**
**(Eugene Division)**

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|---|---|
| **ROBERT T. and NANCY L. DEVANEY**, husband and wife; **R DEVANEY'S CHESTNUT HILL, LLC; N DEVANEY'S CHESTNUT HILL, LLC; R DEVANEY'S NIELSEN COMPLEX, LLC; N DEVANEY'S NIELSEN COMPLEX, LLC; R DEVANEY'S VILLAG AT LAKE NORMAN, LLC;** and **N DEVANEY'S VILLAGE AT LAKE NORMAN, LLC**, all Oregon limited liability companies; **MIKE DUNN, MRD PROPERTIES, LLC,** and **DUNN'S WATERFORD, LLC**, an Oregon limited liability company; **JOHN E. and MARY JANE SEMASKO**, husband and wife, and individually and as trustees of the Semasko Living Trust dated 1-31-95; **SEMASKO'S ENGLEWOOD HEIGHTS, LLC; SEMASKO'S CHESTNUT HILL, LLC; SEMASKO'S CORINTHIANS, LLC;** and **SEMASKO'S CARNEGIE VILLAGE, LLC**, Oregon limited liability companies, by and in their own behalf and in behalf of everyone similarly situated,,<br><br>Plaintiffs,<br><br>v.<br><br>**DAVIS WRIGHT TREMAINE, LLP**, a Washington limited liability partnership,<br><br>Defendant. | Case No. 6:10-cv-06134-HO<br><br>**DECLARATION OF MICHAEL J. ESLER** |



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I, Michael J. Esler, declare as follows:

1. I am one of the attorneys representing Sunwest investors/third-party claimants in the Sunwest Litigation. I am duly admitted to practice in the State of Oregon. I have personal knowledge of the facts set forth below. I make this declaration based on my personal knowledge and in support of my clients and my Firm's Petition and Statement for Attorney Fees and Cost Bill.

2. I believe that Esler, Stephens & Buckley, LLP ("ESB" or "Firm") has more experience handling plaintiffs' participant liability cases under the Oregon Securities Law than any firm in Oregon, and we have been instrumental in establishing third party liability principles in the Oregon Securities law. *E.g.*, *Ainslie v. First Interstate Bank of Oregon*, 148 Or. App. 162, 939 P.2d 125 (1997)(bank liable for sham loans to close sale of securities; jury verdict in excess of $10 million); *Anderson v. Carden*, 146 Or. App. 675, 934 P.2d 562 (1997)(established that lawyers are liable for preparing documentation used in connection with sale of securities); *Ainslie v. Spolyar*, 144 Or. App. 134, 926 P.2d 822 (1996)(lawyer liable for actions taken to close securities sales); *Topinka v. ITC Corp.*, [1987-88 Transfer Binder] Blue Sky L. Rep. ¶ 72,615 (D. Or. 1987)(because of firm's advocacy, Court changed legal rule applied in prior Oregon Securities Law case).

3. Our firm also has extensive experience with receiverships formed under the federal securities laws, most notably the Pac Equities receivership and the Capital Consultants receivership. *United States v. Rich*, 317 Fed. Appx. 630 (9th Cir. 2006)(upholding claims bar order); S.E.C. v. Capital Consultants LLC, 185 Fed. Appx. 705 (9th Cir. 2008); *S.E.C. v. Capital Consultants LLC*, 453 F.3d 1166 (9th Cir. 2006).

4. On behalf of my Firm, I have been the person primarily responsible for



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prosecuting investor claims on behalf of the Sunwest investors and Third-Party claims in behalf of the Receiver for the past two and a half years. Initially, my firm associated with Landye Bennett & Blumstein, LLP ("LBB Firm") in these cases for reasons I will explain. Richard Yugler has been the attorney there who was most responsible for handling Sunwest claims.

5. The investor claims include claims asserted in the following cases:

*Davis' Carnegie Village, LLC et al v. First American Title Company dba First American Title Insurance Company of Oregon, a California corporation; et al*, Circuit Court, Oregon, County of Marion, Case No. 08C24198, filed 10/30/08

*C Chinn's Chestnut Hill, LLC et al v. The Palmetto Bank, a South Carolina financial institution; et al*, Circuit Court, State of Oregon, County of Marion, Case No. 09C12601, filed 3/6/09

*Blatchley's Fisher's landing, LLC, an Oregon limited liability company, et al v. Davis Wright Tremaine, LLP, a foreign registered limited liability partnership; and Timothy M. Dozois*, Circuit Court, Multnomah County, Case No. 0810-14167, filed 10/6/08

*Alleman's Kensington, LLC, et al v. Davis Wright Tremaine, LLP, a foreign registered limited liability partnership; and Timothy M. Dozois,* Circuit Court, Multnomah County, Case No. 0812-18021, filed 12/15/08

*B. Fletcher's Town Village, LLC, et al v. v. Davis Wright Tremaine, LLP, a foreign limited liability partnership; and Timothy M. Dozois*, Circuit Court, Multnomah County, Case No. 0901-00827, filed 1/16/09

*Acarregui's Vista Pointe, LLC, et al, v. Kirkpatrick & Lockhart Preston Gates Ellis LLOP, nka K&L Gates LLP, a Delaware limited liability partnership; and R. Gibson Masters*, Circuit Court, Multnomah County, Case No. 0904-05022, filed 4/9/09

*Agee's Wyndmoor, LLC, et al, v. Thompson & Knight, LLP, a Texas limited liability partnership and Kevin Thomason, a partner, and Robert H. Zink*, Circuit Court, Multnomah County, Case No. 0905-06413, filed 5/6/09

*Schillinger's 9th & Rose, LLC, et al v. Capwest Securities, Inc., a Colorado corporation; Jeffrey K. Rose, an individual; and John David Thurber, an Oregon resident*, Circuit Court, Marion County, Case No. 09C17702, filed 7/20/09

*John E. and Mary Jane Semasko et al v. Thompson & Knight, LLP and Geffen, Mesher & Company, P.C.*, Circuit Court, Multnomah County, Case No. 1007-10708, filed 7/22/10; removed to USDC, District of Oregon (Eugene Division), Case No. 10-cv-06335-HO (Class Action)

*Robert T. and Nancy L. DeVaney et al v. Davis Wright Tremaine, LLP*, USDC, District of Oregon (Eugene Division), Case No. 6:10-cv-06134-HO, filed 5/27/10 (Class Action)



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These cases collectively will be referred to as "Investor Cases."

6. In addition to the Investor Cases, when these claims were initially filed, we negotiated Tolling Agreements with the respective professionals and defendants named in the Davis Wright Tremaine ("DWT") and K&L Gates cases, protecting all of our other clients who were similarly situated while we pursued a handful of individual investor cases limited to one Sunwest project per case. We handled the cases this way because we believed it would be less expensive and more effective for our clients if we proceeded on a series of smaller cases, based on a single offering and a single project, than to proceed on multiple offerings and multiple projects for many plaintiffs. Under our fee agreement and association agreement, our clients agreed to pool their recoveries and to pay the Firm a 25% contingent fee. The Tolling Agreement prevented the Statutes of Limitations from running against the balance of the clients we represented. This reduced both the overall time and costs of the litigation and defense costs that might be a drain on the "shrinking" insurance coverage of the attorney defendants.

7. We discussed with defendants named in the Investor Cases the reasons for proceeding in this fashion, and the impact of a verdict or judgment in favor of the investors on one or more of the individual project cases. We concluded that the likely effect would be collateral estoppel or *res judicata*, which would make litigation of the additional cases unnecessary. We believed this overall process would be more effective and less expensive than pursuing class actions in behalf of our clients. In addition, it enabled us to maintain a direct attorney-client relationship with the investors we represented. We have done this on dozens of plaintiffs' securities cases in the past and have as much, if not more, experience than any firm in this State in handling mass-plaintiff cases. The only defendant law firm that rejected this process



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was Thompson & Knight and, so, we filed a class action against it: *Semasko v. Thompson & Knight*.

8. We began representing investors in the Sunwest matter in June 2008. Our early examination of our clients' documents and other research into Sunwest showed that the overall problem was huge, involving more than 1,000 separate investors, and that minimal, if any, consideration had been given to the securities laws (both State and Federal) by management of Sunwest. We also contacted the SEC in late August or early September 2008 in the hopes that the SEC would intervene and appoint a Receiver to preserve the value of the Sunwest assets that were still viable. In September 2008, we obtained the transcripts from the *Krauss* trial and from litigation that was on-going in Eugene, which disclosed that the practice of commingling had started as early as 2003 and had never stopped. This research became the centerpiece of our early complaints. We filed our first lawsuit in October 2008 against DWT in behalf of investors in Fisher's Landing, a Vancouver, Washington assisted living center. We sent copies of that Complaint and our research to the SEC through the fall of 2008 and had numerous discussions with them. In addition, we filed two more lawsuits against DWT—*Town Village* and *Kensington Green*—during the fall in order to cover different periods of time when DWT was involved.

9. Because we were concerned that the size of the cases and the discovery demands might stretch beyond the limits of our Firm, for a time we associated with the LBB Firm. In fall of 2008, the LBB Firm commenced the *Town Village* litigation and was primarily responsible for the Town Village investors.

10. The three DWT cases were followed by cases against K &L Gates and Thompson & Knight. We followed the same procedure with respect to these other two law firms as we had in the case of DWT. We obtained a Tolling Agreement from K&L Gates as to the balance of the



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investors we represented, and filed one case against each law firm to serve as a bellwether. When Thompson & Knight rejected this approach, we also filed a class action against it. We continued to keep the SEC advised of what was happening in our civil litigation and sent them drafts of various pleadings and other documents.

11. In the initial six months, we collected voluminous relevant documents from our clients and prepared and thereafter produced documents from our clients who were named parties in the pending Investor Cases. We attempted to gain access to Sunwest files. Meanwhile, the group of investors that we represented increased steadily and we assimilated these investors into the group and into the common pooling arrangements that our other investors had already agreed to. We met with the other attorneys, including Gary Grenley and his partners, who were handling aspects of investor claims. Because their approach to the case appeared at odds with the pooling arrangements we had negotiated with our clients and the distribution plan we felt was likely to emerge from a receivership, we felt that we could not work with them as co-counsel. However, we did agree to enter a joint prosecution agreement so that we could work together without jeopardizing either work product or attorney-client privilege.

12. Early in September 2008, I learned that Sunwest was attempting a nonjudicial reorganization from Steve English, counsel for Jon Harder. Many investors appeared to be bent on securing their property and terminating Sunwest as manager. Because we believed that such an approach could lead to conflicts between clients, we did not agree to represent clients in that respect. We supported the eventual Reorganization Plan (the "Plan") generally from the outset.

13. We attended a number of meetings in early October 2008 with Steve English, who explained to us the plan that Jon Harder had put together to reorganize Sunwest. Our clients were supportive of the pooling aspects of the plan even at these early stages.



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14. During the first six months of the litigation, we continued to keep in touch with the SEC and supplied copies of the Complaints as filed, and provided them witnesses to assist in their investigation. We continued to encourage the SEC to become involved because we believed that an SEC Receivership would be the most beneficial way to accomplish the roll-up and preserve the on-going value of the Estate. We supplied copies of our Complaints to Paul Connolly's office and to Gary Grenley's office, and they patterned the Complaints they filed on our pleadings.

15. The theories of liability developed by this Firm in our initial Complaint against DWT in the *Fisher's Landing* case became the centerpiece of the SEC Complaint in March 2009. We furnished the SEC with documents, copies of the Complaints, and witnesses that were then used by the SEC in its initial application for the appointment of a Receiver. During the initial hearings on the motions for appointment of a Receiver, we continued to work with the SEC on the securities claim aspects of their Complaint. Our clients recognized that the best possibility of an optimal result rested in appointment of a Receiver and the roll-up of all of the properties and entities formed as part of the Sunwest Enterprise. The Court may recall that these efforts were resisted by many of the other represented investors.

16. Between October 2008 and March 2009, my Firm also continued to collect and analyze investor documents. The group of clients the Firms represented each signed a written contingent fee agreement. The group grew to more than 160 individuals and more than 350 separate investments including tenancy-in-common ("TIC") ownership interests, limited liability company membership interests, loans to the Sunwest Enterprise and Jon Harder, and assumed debt. The final contingent fee agreement provided for a 25% contingent fee based on the actual cash recovered from third party litigation. Attached as Exhibit 1 is a true copy of the prototype



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fee agreement. Exhibit 2 is a schedule of the clients, amounts of their investment losses as of June 30, 2008, and the amounts of debt assumed.

17. We refused to represent investors who were attempting to recover or take over specific projects and, later, refused to represent them in connection with claims in the Receivership proceedings because of perceived conflicts among members of the investor group based on differences in their specific claims.

18. The strategy of bringing separate claims for typical investments was successful. The DWT cases were designated as "complex" cases in Multnomah County Circuit Court and assigned to Judge Jerome LaBarre. Judge LaBarre set a pretrial and discovery schedule for the cases and trial dates. Defendants DWT and K&L Gates entered into Tolling Agreements and, when Thompson & Knight refused to do so, we filed a class action in State Court to toll the statute of limitations.

19. In March 2009, when the SEC filed its Complaint, we worked closely with the SEC in the negotiations that led to the final order appointing the Receiver.

20. Thereafter we participated with the Receiver's attorneys in reviewing more than 1,500,000 documents produced by Sunwest, DWT and K&L Gates. Because there were fundamental gaps in Sunwest records, searches of all three databases were necessary.

21. In working with the SEC's attorneys, we tried to collaborate so that we did not duplicate their efforts and vice versa. We became primarily responsible for development of the DWT and K&L Gates cases and the Allen Matkins Firm became primarily responsible to review the 40 boxes of Thompson & Knight production. Thompson & Knight produced documents in hard copy.

22. An Order was entered on June 9, 2009, appointing my Firm and the LBB Firm to



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represent investor interests in the DWT mediation. This Order retrospectively recognized what was actually occurring. In this process, the Estate was able to save hundreds of thousands of dollars because our Firms were doing the discovery and development of the cases rather than the Receiver's counsel, and were doing so on a contingent fee basis.

23. The first mediation scheduled was with DWT. My Firm became primarily responsible for the factual and legal research and the preparation of the mediation statements, assembly of key documents, preparation of responses and supplemental materials. We participated in the preparation for witness interviews and interviewed many of the investors who had direct communications with the DWT firm.

24. In this process, we saved the Estate substantial legal fees and costs because of our knowledge about the actual investors and their experiences that we learned during our early work (first six months of litigation) before the SEC Complaint was filed. We were up to speed.

25. Our work and preparation enabled the parties to present a fully-developed case in early mediations with DWT. In my opinion, none of the other participants from the investor side was prepared to do this in the Summer of 2009. Since the DWT insurance coverage had a wasting element, we believed that sharing our factual and legal analysis with DWT was an important part of the mediation because, otherwise, the DWT defendants would have had to do the same work to evaluate the claims. We also spoke frankly with DWT's counsel about the claims and the strategic value of pursuing the cases on an offering-by-offering basis, beginning with a local offering—Fisher's Landing.

26. We were well acquainted with DWT's counsel from past litigation and our reputation for taking cases like this to trial was well known by them, as was our track record in winning these cases.



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27. The Court may recall some aspects of the DWT mediation. We drew a hard line, trying to maximize the recovery and establish a bargaining base for the cases that followed. We realized that the DWT settlement would impact the settlements in the K&L Gates and Thompson & Knight cases since the same carrier and adjustors were involved in all three cases. The DWT mediation actually extended over six days, three of which were in Eugene.

28. I believe the settlement was millions of dollars more than if our Firm had not been involved, especially considering the pressure to settle at $20 million. In that mediation, the major work was done by my Firm.

29. The next mediation was with K&L Gates. In preparation for this mediation, we worked closely with the Receiver's attorneys, the Grenley law firm and the Bullivant House law firm. Still, the major work on the mediation statements and responses were handled by my Firm. My Firm, again, was primarily responsible for the mediation briefing.

30. The defense in the K&L Gates case took a different tack, pointing to DWT as the main culprit and aggressively asserting numerous defenses. Barnes Ellis conducted three hour "interviews" of numerous investors. We prepared and represented our clients. We challenged the damage summaries prepared by K&L Gates for the mediation—summaries that minimized K&L Gates' exposure to $500,000. We researched and supplied responses, sometimes overnight, working closely with the Bullivant firm and the mediators. We also prepared and presented a Power Point presentation, separating the K&L Gates offerings (and damages) from DWT and Thompson & Knight. When K&L Gates demanded an analysis of which projects failed and what actual investors lost, we were able to generate that information quickly, in part because of our work on the DWT case.

31. K&L Gates and Thompson & Knight involved different projects and offerings



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than DWT so both required us to learn a new set of facts. In addressing the K&L Gates and Thompson & Knight claims, we took a different tack than the DWT cases, developing a theory that in mid-2006, K&L Gates and Thompson & Knight jointly developed a fundamental modification in the way the Sunwest Enterprise developed and sold projects—the nonaffiliated Propco structure—and then gave weak tax opinions—"more likely" as opposed to the industry standard "should" level opinions. This required us to become familiar with industry standards for opinions and the regulations surrounding 1031 exchanges.

32. Since the factual theories against K&L Gates and Thompson & Knight had substantial overlap, and the adjusters were the same, after a total of seven days of mediation between the two, the final mediations were consolidated in Eugene.

33. In the Thompson & Knight cases, we worked closely with the Receiver's counsel. Independently, we reviewed the Sunwest, K&L Gates and DWT production databases for additional documents. The premediation "interviews" of Thompson & Knight were handled by this Firm in Texas.

34. Eventually, the K&L Gates and Thompson & Knight cases reached settlement terms which were particularly attractive because they enabled plaintiffs and the Receiver to link the three law firm settlements into one set of class notices and hearings.

35. The Court appointed John Stewart to coordinate mediation efforts at the end of 2009. My Firm has worked very closely and effectively with him. Together we brought closure to the final negotiations of the DWT settlement documents and notices. When K&L Gates and Thompson & Knight settled, my Firm worked nights and weekends on the settlement documents to get done in about ten days what had taken almost as many months in the DWT settlement (albeit with many more participants).



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36. Throughout the DWT, K&L Gates and Thompson & Knight litigation, my Firm has had a continuing duty to our clients. We have regular telephone conferences with and reports to them and have answered their individual inquiries as best we could. These services have benefitted the Estate by relieving it of the burden not only of dealing with the hundreds of investors we represent, but also because information has been further shared by them with hundreds of other investors.

37. When the issue of a roll-up versus a liquidation was being hotly debated during the Summer of 2009, our investor group had already agreed to pooling damages and quickly formed a nucleus supporting the Receiver and CRO's roll-up plan.

38. When K&L Gates and DWT challenged the factual bases for claims, we were able to identify and supply investor witnesses to establish the factual predicates of the claims quickly and efficiently.

39. I believe the individual and total settlements with the three law firms could not have been achieved in the relatively short space of time without the contributions of my Firm. Also important was the fact that our clients and our Firm supported the litigation efforts at no immediate cost to the Receivership Estate. At times, particularly in the end stages of the DWT mediations, the ability of the Receivership to continue to operate was a key element in the negotiations with potential buyers and achieving the DWT settlement, with its promise of putting money back into the Estate, occurred at a pivotal point in the sale negotiations.

40. The Sunwest cases at times consumed 50% of the billable time for some partners at my Firm over the course of the last thirty months. This has required the Firm to refuse to take on new cases and to delay and postpone other cases. Fortunately, most courts in this District have been aware of the Sunwest litigation and have been accommodating.



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41. One aspect of the Sunwest cases that has a bearing on the reasonableness of fees is that all of the investors who signed agreements with our Firms agreed to at least a 25% contingent fee. I believe the same type of fee arrangements were reached by the other contingent fee attorneys (Gary Grenley and Paul Connolly). It is my understanding that the three Firms represent more than 50% of the outside investors in Sunwest.

42. While negotiating the DWT settlements, the Receiver said he would not object to a 12.5% contingent fee payout from the Litigation Trust.

43. I am familiar with the customary contingent fee rates charged in securities cases in this District. A flat 25% fee is at the very lowest end of what is normal and customary. A 25% contingent fee is also customary in class action cases in the Ninth Circuit. Here, a 12.5% contingency as recommended by the Receiver would be well below normal rates.

44. When these cases were started, there was no reasonable basis to predict that a 25% fee would not be absolutely reasonable. During the first six months of the litigation, and up until two days before the SEC filed its Complaint and sought the appointment of a Receiver, it gave no indication that it would intervene in the litigation.

45. I have requested and received information from the attorneys billing on an hourly basis for the Third-Party Litigation. To date their charges have been:

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| Allen Matkins Leck Gamble Mallory & Natsis LLP | $995,464 |
| Bullivant Houser Bailey PC | $336,000 |
| Stewart Sokol & Gray, L.L.C. | $219,262 |

46. Thus far, my Firm has incurred nearly $1.7 million in hourly fees on the Investor Claims against DWT, K&L Gates and Thompson & Knight at normal hourly rates. In addition,



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we have incurred costs in the amount of $74,134.94. While costs have been reimbursed by our clients, we have agreed to repay them for costs when reimbursed by the Receiver or Litigation Trust. Attached as Exhibit 4 is a detailed statement itemizing the work done and the hourly fees and costs incurred.

47. Exhibit 5 is a summary setting out the normal billing rates for the professionals and para-professionals at my Firm and a summary of time and fees for each.

48. Exhibit 6 consists of selected pages from our Firm's website showing the education, training, and experience levels of the professionals and para-professionals at our Firm, and a summary of reported cases and other achievements.

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 December 21, 2010 in Portland, Oregon.

/s/ Michael J. Esler
Michael J. Esler



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