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Of Attorneys for Investor Claimants

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF OREGON
(Eugene Division)

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,

Case No. 6:10-cv-06134-HO

PETITION FOR ATTORNEY FEES OF ESLER, STEPHENS & BUCKLEY, LLP AND LANDYE BENNETT BLUMSTEIN, LLP

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Plaintiffs,

v.

DAVIS WRIGHT TREMAINE, LLP, a Washington limited liability partnership,

Defendant.

Esler, Stephens & Buckley, LLP and Landye Bennett Blumstein, LLP ("LBB") petition this Court to award them their attorney fees and costs with respect to the settlements with the three law firms in an amount to be determined.

I. FACTUAL BACKGROUND

In June 2008, after Sunwest missed its first interest payments to investors, some of those investors contacted Esler, Stephens & Buckley ("ESB"). Our first clients were Phil and Carolyn Lanstrum, who had invested in Fisher's Landing. With the Lanstrums' help, a group of investors was formed and it hired us to pursue third-party securities actions on their behalf. Over time, the group grew to over 374 separate LLC investors. Because a large number of the LLCs are owned by husband-wife investors, we represent many more than 374 clients.

At the outset we developed a strategy that was designed to maximize the recovery of our investor-clients and at the same time, avoid conflicts between our investor-clients.

First, based upon our experience in the Capital Consultants case and the Pac Equities case, we knew that it was critical to get the Securities and Exchange Commission involved—not as a way of punishing the wrongdoers—but rather as a vehicle for establishing a federal court receivership. We knew that that was not only the best way to stop the dissipation of Sunwest assets and to provide for the orderly administration and equitable distribution of the Sunwest assets, but also as a means

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for the orderly administration and equitable distribution of recoveries in third party securities actions. It was also important that the receivership be a federal court rather than a state court receivership. We knew from prior experience that at the end of the day, in order to resolve third party securities litigation, defendants (lawyers and accountants) all want potential actions to be brought so that they can be resolved and a claims bar entered. It is unclear whether Oregon state courts have that power. Involvement of the federal court was, therefore, critical.

Second, we also told our clients that we would represent them with respect to third party securities actions. We knew that when the SEC became involved, the Court would issue a stay that would bar actions against the primary Sunwest wrongdoers. In this connection, we also told our clients that we would not represent them with respect to efforts to get individual properties "out from under" the Receivership. Among other reasons: (1) We considered Sunwest to share many characteristics with a Ponzi-scheme and we knew that it was very likely that a federal court was going to pool all investors and all investments. (2) We did not think it was a good idea. (3) The likelihood was that a fight would pit investors against one another, thereby weakening their claims and creating irreconcilable differences. (4) We thought most Sunwest projects had been "oversold," and did not believe that most ordinary investors were going to have better luck managing a facility than Sunwest. (5) More importantly, we recognized that if the truly valuable properties were withdrawn from the Receivership estate, it would simply harm our other investor-clients disproportionately.

Third, we also told our clients that we would represent them on a contingent fee basis. We knew that many of our clients had been wiped out by their losses and could not afford to pay us on an hourly rate. Initially, our clients agreed to pay us on a standard one-third, 40%, 50% basis. After

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this Receivership was created, we reduced the percentage to 25% in keeping with the Ninth Circuit benchmark in common fund cases.

Fourth, we developed a litigation strategy where we would file a securities action in state court against the third party professionals with respect to a single project. After the action was filed, we would then obtain a tolling agreement from the third party professionals on behalf of our other clients. We knew from prior experience that class actions and multi-project actions are unnecessarily expensive, administratively difficult, and cumbersome to try. When we were approached to be local counsel for an investor class action, we refused. We knew that most of the time, in these kinds of cases, the first trial leads to a global settlement and that no one gains from a multiplicity of actions, or for that matter, a non-settlement class action. (We do recognize that a class action filed in connection with a settlement can be a benefit.) We also knew that it was better to file the actions in state court. We believe the Oregon Securities Law provides better protection to investors than the federal securities laws, and over the last 15 years, Congress has passed a number of procedural statutes that are less favorable to investors in federal court securities cases.

The only "downside" with our strategy, if one can call it that, was that not only would our investor-clients benefit from our work, but it was very likely that other investors would benefit as well and were not obligated to pay our fees. This created the problem that the other investors would effectively free-ride on our client-investors. One of our hopes was and has been that through the mechanism of the Receivership all the investors who benefited from our work would equitably bear the cost (fees) of producing that benefit. That is what had happened in the Pac Equities case and we believe should happen here as well.

With that strategy in place, we proceeded to investigate the case. We reviewed many

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thousands of documents, interviewed our clients and third party witnesses, and brought to bear years of experience in analyzing securities fraud schemes. We prepared and filed our first complaint against DWT in connection with the Fisher's Landing offering—the one the Lanstrums had first brought to us. Thereafter, we prepared and filed two other representative actions against DWT. As we had expected, DWT entered into a tolling agreement with our other clients and there was no need to file further actions.

At this point in time, given that there could be more than 1200 individual investors, we recognized that the Sunwest cases might be larger than our firm could handle by itself. We contacted Rick Yugler at LLB and associated them as counsel. We had worked with Mr. Yugler and his firm in the past and knew that they would bring the same high quality, experienced representation that we believed we were providing. That relationship worked well and served our clients well.

As noted above, to facilitate the establishment of what became this Receivership, we also contacted the SEC. We provided the SEC lawyers with information about the case, documents, and access to our clients. Perhaps most importantly, we also provided them with our complaints, which provided our analysis of the case. If one compares the complaint that the SEC filed with the complaints that we filed, one can see that the SEC's analysis largely tracks our analysis.

After the Receivership was instituted and this Court established control over the Receivership estate both through this action and the bankruptcy actions, we always worked in a manner that was consistent with our original strategy, in a manner designed to produce the maximum benefit for our client-investors, and, incidentally, in a manner that produced the maximum benefit to all investors. In particular, we worked with the Receiver to ensure that the

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interests of all the investors were being protected, despite the efforts of some others to thwart our efforts. We worked cooperatively with the Court-appointed mediators, and with John Stewart, Steve English's firm, and Allen Matkins, and to make sure that the third party securities cases were well-investigated and, at the same time, avoided duplication.

We also filed actions against Thompson & Knight and K&L Gates. Thompson & Knight was unwilling to enter into a tolling agreement and so we filed a class action against them and one of the accounting firms. (Under ORCP 32 N, commencing an action asserting a class action tolls the statute of limitations for all class members.)

In advance of the DWT mediation, we methodically went through the documents and formulated the compelling case against DWT laid out in our mediation statement and supporting documents that brought DWT to settlement. We did the very same thing again with Thompson & Knight, and K&L Gates.

As a consequence of our efforts, some with the excellent efforts of other lawyers and some due mostly to our efforts, we have recovered some $52.5 million from the law firm settlements for the Litigation Trust.

The work by our firm, ESB, and the facts set out in this Petition, are detailed in the Declaration of Michael J. Esler and the attached statements. The work by LBB is detailed in the Declaration of Richard Yugler and the attached statements. We have also filed the statements in the required .csv format to facilitate their review.

II. LEGAL STANDARD

The underlying actions that were filed and that would have been filed with respect to this matter were filed under the Oregon Securities Law. ORS 59.115(10) provides that "the court may

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award reasonable attorney fees to the prevailing party in an action under this section [ORS 59.115]." ORS 59.137(4) is to the same effect. In addition, ESB and LLB have contingent fee agreements with their 374+ clients. These agreements provide for a 25 % contingent fee.

Finally, as a consequence of the Court's plan and the settlements, this has become a common fund case. In this case, we have created a common fund from which an award of attorney fees based upon the equitable common fund doctrine is proper. *State Farm Mut. Auto. Ins. v. Clinton*, 267 Or. 653, 657, 518 P.2d 645 (1974); *Strunk v. PERB*, 341 Or. 175, 181, 139 P.3d 956 (2006)(*Strunk II*).

It is a little unclear whether this Court should apply a state law or a federal law standard to the award of attorney fees. We will provide both analyses and we believe they lead to the same result.

With respect to state law, ORS 20.075 provides:

> (1) A court shall consider the following factors in determining whether to award attorney fees in any case in which an award of attorney fees is authorized by statute and in which the court has discretion to decide whether to award attorney fees:
>
> (a) The conduct of the parties in the transactions or occurrences that gave rise to the litigation, including any conduct of a party that was reckless, willful, malicious, in bad faith or illegal.
>
> (b) The objective reasonableness of the claims and defenses asserted by the parties.
>
> (c) The extent to which an award of an attorney fee in the case would deter others from asserting good faith claims or defenses in similar cases.
>
> (d) The extent to which an award of an attorney fee in the case would deter others from asserting meritless claims and defenses.
>
> (e) The objective reasonableness of the parties and the diligence of the parties and their attorneys during the proceedings.
>
> (f) The objective reasonableness of the parties and the diligence of the parties in

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pursuing settlement of the dispute.

(g) The amount that the court has awarded as a prevailing party fee under ORS 20.190.

(h) Such other factors as the court may consider appropriate under the circumstances of the case.

(2) A court shall consider the factors specified in subsection (1) of this section in determining the amount of an award of attorney fees in any case in which an award of attorney fees is authorized or required by statute. In addition, the court shall consider the following factors in determining the amount of an award of attorney fees in those cases:

(a) The time and labor required in the proceeding, the novelty and difficulty of the questions involved in the proceeding and the skill needed to properly perform the legal services.

(b) The likelihood, if apparent to the client, that the acceptance of the particular employment by the attorney would preclude the attorney from taking other cases.

(c) The fee customarily charged in the locality for similar legal services.

(d) The amount involved in the controversy and the results obtained.

(e) The time limitations imposed by the client or the circumstances of the case.

(f) The nature and length of the attorney's professional relationship with the client.

(g) The experience, reputation and ability of the attorney performing the services.

(h) Whether the fee of the attorney is fixed or contingent.

In their declarations, Mike Esler and Rick Yugler run through each of these factors to the extent they are relevant to this matter.

There are three Oregon cases to bring to the Court's attention. First, in *Griffin v. Tri-Met*, 112 Or. App. 575, 584-85, 831 P.2d 42 (1992), *rev'd* on other grounds, 318 Or. 500, 870 P.2d 808 (1994), the Oregon Court of Appeals affirmed an award of plaintiff's attorney fees at twice the lawyer's standard rate. The court noted the complexity of the case, the limited number of lawyers qualified to handle a case like that, and evidence that lawyers who successfully take cases on a

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contingent fee basis are generally compensated at rates greatly exceeding standard billing rates for general legal services.

Second, in *Strawn v. Farmers Ins. Co.*, 233 Or. App. 401, 226 P.3d 86 (2010), a case handled by Rick Yugler, the court of appeals affirmed an award of attorney fees based upon an attorney fee statute as well as a common fund theory. The court used a multiplier of 1.6 to enhance the fee award for work done on the appeal. The court noted that the trial court had used a multiplier of 2.25 to enhance the award for the work done at trial.

Finally, in *Strunk v. PERB*, 343 Or. 226, 233, 246, 169 P.3d 1242 (2007)(*Strunk III*), the Oregon Supreme Court approved the use of multipliers of 1.5 and 2.0 for work done. In *Strunk III*, the court said that "in common fund cases, the preserved fund itself is a primary measure of success," that the recovery was an "exceptional success," and that "factors such as the difficulty and complexity of the issues involved in this case, the value of the interests at stake, as well as the skill and professional standing of lawyers involved also support an enhancement of fees." 343 Or. at 246.

The Ninth Circuit's cases on attorney fees do not lead to a different result. In a common fund cases, "where the settlement or award creates a large fund for distribution," the Ninth Circuit "has established 25% of the common fund as a benchmark award for attorney fees." The Court has the discretion, in proper cases, to increase or decrease the award based upon the lodestar calculation in the case (multiplying "the number of hours reasonably expended by a reasonable hourly rate"), or to make the award solely based upon the lodestar. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir.1998).

In *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002), the court conducted a survey (in the appendix to the opinion) of attorney fee awards in class actions over a five year period involving common funds of $50-200 million where the fees were calculated using the percentage method. When compared with the lodestar in those cases, the court found that the

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resulting multipliers ranged from 0.6 to 19.6, with most (20 of 24, or 83%) from 1.0 to 4.0 and a bare majority (13 of 24, or 54%) in the 1.5-3.0 range. *Id.* n.6. In that case, the court affirmed an attorney fee award resulting in a multiplier of 3.65.

In this case a multiplier in the range of 2.0 to 2.5 would be appropriate.

III. LODESTAR

In this case, ESB's lodestar (reasonable time multiplied by reasonable rates) is $1,690,243 with respect to the three law firm matters. ESB also seeks costs in the amount of $74,134.94. LBB's lodestar with respect to the three law firm matters is $211,166.25. LBB also seeks costs in the amount of $3,875.

WHEREFORE, Esler, Stephens & Buckley, LLP and Landye Bennett Blumstein, LLP petition this Court to award them their attorney fees and costs with respect to the settlements with the three law firms in an amount to be determined.

DATED this 21st day of December, 2010.

ESLER STEPHENS & BUCKLEY, LLP

By: /s/ John W. Stephens
John W. Stephens, OSB No. 773583
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