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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
EUGENE DIVISON

Robert T. DeVaney, et al. Plaintiffs, v. Davis Wright Tremaine LLP, a Washington limited liability partnership, Defendant.	Civil No. 10-CV-6134-HO MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Ken and Patricia Houghmaster, et al. Plaintiffs, v. K&L Gates LLP, a Delaware limited liability partnership; and Thompson & Knight LLP, a Texas limited liability partnership, Defendant.	Case No. 10-cv-6321-HO

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I. INTRODUCTION

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiffs respectfully submit this memorandum in support of their motion for final approval of the Settlements of this litigation for $52,500,000.00 in cash (the "Settlements") and approval of the proposed plan of allocation of the Settlements. The terms of the three Settlements are set forth in the parties' Settlement Agreements, which have been previously submitted to the Court. Mem. in Supp. of Am. Joint Mot. for Preliminary Approval of Class Action Settlement, Ex. A, *DeVaney v. Davis Wright Tremaine LLP*, 10-CV-6134-HO, Docket No. 9; Unopposed Mot. for Preliminary Approval of Class Action Settlement, Ex. A, *Houghmaster v. K&L Gates LLP*, Case No. 6:10-cv-06321-HO, Docket No. 6. Plaintiffs are submitting a single motion for final approval of the three Settlements because the Court conditionally certified a single, consolidated class action on behalf of the single class contemplated by each of the three Settlements.

As discussed in detail below, the proposed Settlements are in the best interests of the Class and represent a very substantial recovery. Accordingly, Plaintiffs respectfully move for final approval of the proposed Settlements. Plaintiffs further submit that the proposed Plan of Allocation is fair and reasonable and should be approved. Defendants do not oppose Plaintiffs' motion.

II. BACKGROUND

The backgrounds of these cases are described in detail in other submissions to the Court.[1] To summarize the most relevant points, the *DeVaney* class action was filed on May 28, 2010 for purposes of effectuating the Settlement between the *DeVaney* plaintiffs and Davis Wright Tremaine LLP ("DWT"). The *Houghmaster* class action was filed on October 4, 2010 for purposes of effectuating the Settlement between the *Houghmaster* plaintiffs and K&L Gates LLP

[1] *See* Mem. in Supp. of Am. Joint Mot. for Preliminary Approval of Class Action Settlement at 2-5, *DeVaney*, Docket No. 9; Corrected Mem. in Supp. of Unopposed Mot. for Preliminary Approval of Class Action Settlement at 3-5, *Houghmaster*, Docket No. 9.

("KLG") and also the Settlement between the *Houghmaster* plaintiffs and Thompson & Knight LLP ("T&K").

The parties in the *DeVaney* case jointly filed a Motion for Preliminary Approval of Class Action Settlement on July 9, 2010 and filed an amended motion on July 26, 2010. The *Houghmaster* plaintiffs and the Court-appointed Receiver filed a similar motion in that case on October 7, 2010. After briefing and oral argument, the Court granted preliminary approval of the Settlements on October 8, 2010. Order Approving Class Action Settlements at 3, *DeVaney*, Docket No. 18. In that Order, the Court found that "the prerequisites for a class action under Federal Rules of Civil Procedure 23(a) and (b)(3) have been met" and conditionally certified the "Actions as a single, consolidated class action on behalf of the following Settlement Class:"

> (a) all individuals and entities that purchased investments in the Sunwest Enterprise[2] on or after January 1, 2002, and (b) Plaintiff Receiver as assignee of the claims or interests of any such individuals or entities. The investments were in the form of investor, noncommercial notes, tenancy-in-common ("TIC") interests, membership interests, preferred membership interests, or limited partnership interests in one or more properties managed by or affiliated with Sunwest Management, Inc.

Id. at 2.

The Court also appointed Cohen Milstein Sellers & Toll PLLC and Esler Stephens & Buckley as Class Counsel to represent the settlement class, *id*. at 2, scheduled a hearing to determine whether it should grant final approval of the Settlements for February 4, 2011, *id*. at 3,[3] and approved the parties' proposed method of notice to the Class, *id*. at 6.[4] On November 3,

[2] The "Sunwest Enterprise" included Sunwest Management, Inc., Canyon Creek Development, Inc., Canyon Creek Financial, LLC, and numerous other affiliated, single-purpose entities that were created by entities owned or controlled by Sunwest Management, Inc., Jon M. Harder, and/or Darryl E. Fisher for the purpose of owning and operating senior living facilities and other real estate developments.

[3] The hearing has been rescheduled for February 9, 2011.

2010, the Court granted the Joint Motion to Extend Deadlines for Objections to Attorney Fee Applications and Modifying Class Notice. Order, *DeVaney*, Docket No. 21.

The Class notice advises Class members that they have until January 7, 2010 to file any objection to the proposed Settlement and until January 18, 2011 to file any objection to Lead Counsel's request for an award of attorneys' fees and reimbursement of litigation expenses. The notice also indicates that the Court's order provides that class members have until January 5, 2011 to request to be excluded from the Class.

The notice was initially mailed to Class members on November 8, 2010. Declaration of Michael A. Grassmueck in Support of Joint Motion for Final Approval of Class Settlement ("Grassmueck Decl.") ¶ 3. The notice has been made available to Class members on the Settlement website (http://www.grassmueckgroup.com/sunwest.php), along with other key documents likely to be of interest to Class members, such as the summary notice, Settlement Agreements, the preliminary approval order, and the Distribution Plan. *Id.* ¶ 5. On December 1, 2010, *The Oregonian* published the Court-approved summary notice of the Settlements, which contains a brief description of the Settlements and explains how class members can obtain a copy of the full notice.[5] *Id.* ¶ 4.

As of December 20, 2010, the claims administrator had received no requests for exclusions and no objections to the Settlements. *Id.* ¶ 8. Plaintiffs will provide the Court with updated numbers once the deadlines for requesting exclusion and objecting to the Settlements have passed.

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[4] A copy of the notice sent to the class is attached as Exhibit A to the accompanying Grassmueck Declaration.

[5] A copy of the published summary notice to the class is attached as Exhibit B to the Grassmueck Declaration.

The total Settlement fund is $52.5 million in cash, which is the sum of the three Settlements with DWT ($30 million), KLG ($15 million), and T&K ($7.5 million). Assuming that every potential class member files a claim, the proposed Settlements would collectively provide an estimated recovery of approximately 20-25% of the class members' losses (calculated as the investments less the amount reimbursed to investors by the estate), before deduction of court-approved fees and expenses. Lead Counsel believe that the Settlements are fair, reasonable, and adequate and recommend that they be approved.

III. ARGUMENT

A. A Proposed Class Action Settlement Should Be Approved if it is Fair, Reasonable, and Adequate

It is well established in the Ninth Circuit that "voluntary conciliation and settlement are the preferred means of dispute resolution." *Officers for Justice v. Civil Service Comm'n.*, 688 F.2d 615, 625 (9th Cir. 1982). Class action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome and the typical length of the litigation. "[T]here is an overriding public interest in settling and quieting litigation," and this is "particularly true in class action suits." *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976); *Util. Reform Project v. Bonneville Power Admin.*, 869 F.2d 437, 443 (9th Cir. 1989).[6]

A proposed settlement of a class action under Federal Rule of Civil Procedure 23(e) should be approved when the proposed settlement is "fair, adequate, and reasonable." *Pac. Enters.*, 47 F.3d at 377; *Officers for Justice*, 688 F.2d at 625. The Ninth Circuit has provided a list of factors that may be considered in evaluating the fairness of a class action settlement:

- the strength of the plaintiffs' case;

[6] The law always favors the compromise of disputed claims, *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910); *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995); *MWS Wire Indus., Inc. v. Cal. Fine Wire Co.*, 797 F.2d 799, 802 (9th Cir. 1986).

- the risk, expense, complexity, and likely duration of further litigation;
- the risk of maintaining class action status throughout the trial;
- the amount offered in settlement;
- the extent of discovery completed and the stage of the proceedings;
- the experience and views of counsel; and
- the reaction of the class members to the proposed settlement.

In re Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 458 (9th Cir. 2000) (internal quotations omitted); *see also Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 720 F. Supp. 1379 (D. Ariz. 1989), *aff'd sub nom. Class Plaintiffs v. Seattle*, 955 F.2d 1268 (9th Cir. 1992). "'The relative degree of importance to be attached to any particular factor will depend upon . . . the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case.'" *Woo v. Home Loan Group*, No. 07-CV-202 H (POR), 2008 U.S. Dist. LEXIS 65144, at *8 (S.D. Cal. Aug. 25, 2008) (quoting *Officers for Justice*, 688 F.2d at 625).

The district court must exercise "sound discretion" in approving a settlement. *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff'd*, 661 F.2d 939 (9th Cir. 1981); *Torrisi*, 8 F.3d at 1375. However, a strong initial presumption of fairness attaches to the proposed settlement if it is reached by experienced counsel after arm's-length negotiations, and great weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation. *Hughes v. Microsoft Corp.*, No. 98-CV-1646, 2001 U.S. Dist. LEXIS 5976, at *21 (W.D. Wash. Mar. 26, 2001). Therefore, in exercising its discretion,

> the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary

> to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.

Officers for Justice, 688 F.2d at 625. The Ninth Circuit defines the limits of the inquiry to be made by the Court in the following manner:

> Therefore, the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits. Neither the trial court nor this court is to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what ***might*** have been achieved by the negotiators.

Id. (emphasis in original). As explained below, application of these criteria shows that these Settlements warrant the Court's approval.

B. <u>The Proposed Settlements Should Be Approved</u>

1. The Parties Were Able to Identify the Strengths and Weaknesses of Their Cases

The stage of the proceedings and the amount of information available to the parties to assess the strength and weaknesses of their cases is one of the factors that courts consider in determining the fairness, reasonableness, and adequacy of a settlement. *See Mego Fin. Corp.*, 213 F.3d at 458; *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975); *see also Weinberger v. Kendrick*, 698 F.2d 61,74 (2d Cir. 1982); *Ellis*, 87 F.R.D. at 18; *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 616-17 (N.D. Cal. 1979).

Here, the Settlement Agreements were each made following sufficient fact discovery and litigation, and after extensive, arm's-length negotiations by experienced counsel with the assistance of a skilled mediator. Although the *DeVaney* and *Houghmaster* actions were filed recently for the purposes of settlement, they arose out of a series of state court actions that were filed in 2008 and 2009 and are closely related to various other actions that have been extensively

litigated in federal court. There has been significant fact discovery during the mediation of these actions including, in particular, significant access to documents regarding the activities of the Sunwest Enterprises, and the role played by outside counsel, including information obtained from the Court-appointed Receiver's investigation. As a result, the parties and the Court are in a position to assess the strength of these cases and the comparative benefits of the proposed Settlements. Thus, the progress in the litigation also favors approval of the Settlements as fair. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,1026 (9th Cir. 1998) (providing that a court should consider "the extent of discovery completed and the stage of the proceedings" in making a final-approval determination). Also, the history of the negotiations recounted above creates a presumption that the Agreements' terms are facially fair, adequate, and reasonable. *See Nat'l Rural Telecomm. Coop. v. DIRECTV, Inc*., 221 F.R.D. 523, 528 (C.D. Cal. 2004) ("A settlement following sufficient discovery and genuine arm's-length negotiation is presumed fair.").[7]

2. The Settlements Avoid the Risks of Litigation and Provide the Benefit of a Certain and Immediate Recovery to the Class

To determine whether the proposed Settlements are fair, reasonable, and adequate, the Court must balance the continuing risks of litigation against the benefits afforded to Class Members and the immediacy and certainty of a substantial recovery. *Mego Fin.*, 213 F.3d at 458; *Girsh*, 521 F.2d at 157; *Boyd*, 485 F. Supp. at 617; *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 741 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986). In other words,

> [t]he Court shall consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief

[7] *Cf. Mego Fin.*, 213 F.3d at 459 (finding parties could identify strengths and weaknesses of claims even without formal discovery because "in the context of class action settlements, 'formal discovery is not a necessary ticket to the bargaining table' where the parties have sufficient information to make an informed decision about settlement.") (quoting *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir. 1998)).

> in the future, after protracted and expensive litigation. In this respect, [i]t has been held proper to take the bird in hand instead of a prospective flock in the bush.

Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc., 221 F.R.D. 523, 526 (C.D. Cal. 2004) (internal quotations and citations omitted).

In the context of approving class action settlements, courts attempting to balance these factors have recognized "that stockholder litigation is notably difficult and notoriously uncertain." *Lewis v. Newman*, 59 F.R.D. 525, 528 (S.D.N.Y. 1973); *see also Republic Nat'l Life Ins. Co. v. Beasley*, 73 F.R.D. 658 (S.D.N.Y. 1977). Here, a balance of these factors weighs heavily in support of approval of the Settlements and unquestionably outweighs the distinct possibility that the Class would receive little or no recovery at all.

a. The Risks of Continued Litigation

In this action, it is clear that if litigated to trial, Defendants would vigorously contest liability and raise numerous legal challenges to Plaintiffs' claims. Also, as a procedural matter, there is a risk that Defendants would argue that a class should not be certified, or if certified, that the class could not be maintained throughout a trial. *See Lane v. Facebook*, No. 08-3845, 2010 U.S. Dist. LEXIS 24762, at *17 (N.D. Cal. Mar. 17, 2010) ("The risk that a class action may be decertified at any time generally weighs in favor of approving a settlement.") (citing *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 966 (9th Cir. 2009)). There is also the risk of significant expense if a multiplicity of individual actions, as well as the class action, were to proceed. In addition to these procedural issues, Defendants have made clear that they would dispute the allegations that misrepresentations and omissions were made, that investors were unaware of the risks attending these investments, and whether Defendants either knew or should have known that misrepresentations and omissions were being made. While the parties have different views of these issues, it is clear that litigation of this matter on behalf of more than one

thousand investors would have involved extensive discovery, numerous depositions of Defendants, Sunwest Enterprise officials, other third parties, and investors, and a protracted trial of this matter involving significant risks for both sides. The Settlement Agreements provide significant compensation to investors while avoiding further expense and the attendant risks associated with complex litigation of this kind. *See Hanlon*, 150 F.3d at 1026 (providing that a court should consider "the risk, expense, complexity, and likely duration of further litigation" and "the risk of maintaining class action status throughout the trial" in making a final-approval determination).

b. The Settlements Provide a Substantial Benefit to the Class

In the face of the abundant risks of continued litigation, the proposed Settlements provide the class with a prompt and certain recovery of $52.5 million, a very significant sum, especially given the relatively modest size of the Class. The recovery is a substantial percentage of the total estimated damages suffered by the Class and is greater than the percentage typically recovered in securities class actions. In *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036 (N.D. Cal. 2008), the court described a recovery of 9% of possible damages as "a substantial achievement on behalf of the class" and noted that the average recovery in securities class actions is less than 3% of possible damages. *Id*. at 1046; *see also Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 & n.2 (2d Cir. 1974) ("[T]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery."). Accordingly, while Plaintiffs believe that the aggregate damages that could be established at trial could be higher than the Settlement amounts, such a result assumes that *all* significant liability and damage issues would have been resolved in favor of Plaintiffs. Therefore, the recovery afforded by the Settlements represents a substantial sum compared to the total damages sought,

especially when considering the possibility that any damages recovered at trial could be much less.

c. Balancing the Certainty of an Immediate Recovery Against the Expense and Likely Duration of Protracted Litigation and Trial Favors Settlement

The immediacy and certainty of a recovery is a factor for the Court to consider in determining whether the proposed Settlement should be approved. *See, e.g., Girsh*, 521 F.2d at 157. Courts consistently have held that "[t]he expense and possible duration of the litigation should be considered in evaluating the reasonableness of [a] settlement." *Milstein v. Huck*, 600 F. Supp. 254, 267 (E.D.N.Y. 1984); *Officers for Justice*, 688 F.2d at 626; *Boyd*, 485 F. Supp. at 616-17; *Bullock v. Adm'r of Kircher's Estate*, 84 F.R.D. 1, 10 (D.N.J. 1979). Therefore, the benefit of the present Settlements must also be balanced against the expense of achieving a more favorable result at trial. *Young v. Katz*, 447 F.2d 431, 433 (5th Cir. 1971).

Approval of the Settlements will mean a present recovery for eligible claimants. If not for these Settlements, Plaintiffs would have been required to litigate motions to dismiss and motions for class certification; negotiate and then complete additional and lengthy formal discovery, both as to depositions and document review, and with expert discovery; and brief and argue long and detailed summary judgment motions, the outcomes of which are far from certain. Even assuming that the case withstood summary judgment, a trial would have occupied weeks of the Court's time and the time and costs of the Parties and their attorneys, and would have required substantial and costly expert testimony on both sides. Then, a judgment favorable to the Class, in light of the contested nature of virtually every aspect of this case, would unquestionably be the subject of post-trial motions and further appeals, which could prolong the case for several more years. Therefore, delay, not just at the trial stage but through post-trial motions and the

appellate process as well, could force Class Members to wait many more years for any recovery, further reducing its value. Such appeals would be time consuming and might lead to the reversal of any favorable verdict. *See, e.g.*, *Warner Commc'ns*, 618 F. Supp. at 745 (delay from appeals is a factor to be considered). A prompt, certain recovery is considerably more valuable to the Class than an uncertain recovery at some undetermined point in the future. *See Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284 (7th Cir. 2002) ("To most people, a dollar today is worth a great deal more than a dollar ten years from now.").

Accordingly, the Settlements ensure a very substantial recovery while also eliminating the risk of little or no recovery at all, and are in the best interest of the Class.

3. The Recommendations of Experienced Counsel Who Negotiated at Arm's- Length Without Fraud or Coercion Heavily Favors Approval of the Settlements

Experienced counsel, negotiating at arm's-length, have weighed the factors discussed above and endorse the Settlements. As numerous courts have stated, the view of the attorneys actively conducting the litigation, while not conclusive, "is entitled to significant weight." *Fisher Bros. v. Cambridge-Lee Indus., Inc.*, 630 F. Supp. 482, 488 (E.D. Pa. 1985); *Ellis*, 87 F.R.D. at 18 ("the fact that experienced counsel involved in the case approved the settlement after hard-fought negotiations is entitled to considerable weight"); *Boyd*, 485 F. Supp. at 622 ("the recommendations of plaintiffs' counsel should be given a presumption of reasonableness."); *Nat'l Rural*, 221 F.R.D. at 528 ("[g]reat weight" should be accorded to the views of experienced class counsel "who are most closely acquainted with the facts of the underlying litigation."); *In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.*, MDL No. 901, 1992 U.S. Dist. LEXIS 14337, *8 (C.D. Cal. June 10, 1992) (finding belief of counsel that the proposed settlement represented the most beneficial result for the class to be a compelling factor in approving settlement).

In approving a settlement, courts often focus on the "negotiating process by which the settlement was reached." *Weinberger*, 698 F.2d at 74. "A presumption of correctness is said to attach to a class settlement reached in arms-length negotiations between experienced capable counsel after meaningful discovery." *Hughes v. Microsoft Corp*., 2001 U.S. Dist. LEXIS 5976, at *20 (W.D. Wash. Mar. 26, 2001) (quoting Manual for Complex Litigation (Third) § 30.42 (1995)); *In re Indep. Energy Holdings PLC*, No. 00 Civ. 6689, 2003 U.S. Dist. LEXIS 17090, at *13 (S.D.N.Y. Sept. 29, 2003) ("the fact that the Settlement was reached after exhaustive arm's-length negotiations, with the assistance of a private mediator experienced in complex litigation, is further proof that it is fair and reasonable").

Here, the actions have been litigated and settled by experienced and competent counsel on both sides of the case. Moreover, the Settlements were reached through the substantial assistance of experienced mediators, the Honorable Senior Circuit Judge Leavy and the Honorable Judge Velure (ret.), who worked over a period of weeks to bring the parties to an agreement. The fact that such qualified and well-informed counsel endorse the Settlements as being fair, reasonable, and adequate to the Class heavily favors this Court's approval of the Settlements.

4. Reaction of the Class Supports Approval of the Settlements

Notices of the Settlements were sent to over 1,908 Class Members on Novermber 8, 2010 and the summary notice was published in *The Oregonian* on December 1, 2010. Grassmueck Decl. ¶¶ 2-4. The Settlements' terms and documents have been posted on the Internet since November 11, 2010. *Id*. ¶ 5. The time period for objecting to the Settlements expires on January 7, 2010. To date, no objections to the Settlements have been filed. *Id*. ¶ 8. Therefore, this factor favors approval. *See, e.g., In re Mfrs. Life Ins. Co. Premium Litig.*, MDL No. 1109, No. 96-230,

1998 U.S. Dist. LEXIS 23217, at *24 (S.D. Cal. Dec. 21, 1998) ("[A] minuscule number of objectors is another factor favoring approval."); *Boyd*, 485 F. Supp. at 624 (adequacy of settlement "persuasive" when 16% of class objected); *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118-19 (3d Cir. 1990) (fact that only 10% of class objected "strongly favors settlement").

Based on the foregoing factors, Plaintiffs request that the Court determine that the proposed Settlements are fair, reasonable, and adequate and grant final approval of the Settlements.

C. The Proposed Plan Of Allocation Is Fair, Reasonable, And Adequate And Should Be Approved

Lead Plaintiff also seeks approval of the methodology by which the settlement proceeds will be allocated among Class members (the "Plan of Allocation"). The Plan of Allocation is based on the Amended Distribution Plan approved by the Court in the related SEC action. *See SEC v. Sunwest Mgmt., Inc.*, et al, No. 09-cv-6056-HO (D. Or.), Docket Nos. 537, 875. The Amended Distribution Plan establishes a Litigation Trust, which will hold the Settlement Fund, and from which various claimants, including Class Members, will be paid. Money distributable under the terms of the Litigation Trust will be distributed as follows. First, the Receiver's claims for disgorgement of ill gotten gains, avoidance action recoveries/settlement, and other Receiver and receivership entity recoveries/settlements (e.g., for breach of fiduciary duty, malpractice, conflicts, lender liability, etc.) will be shared pro rata by all Sunwest Enterprise claimants including investors and unsecured creditors, and including Class Members who have also filed a claim in the Receivership case. The Receiver has agreed that it will not request more than $5 million from the Settlement Fund for these purposes, and has indicated that more than 75% of the requested funds will be paid to investors.

Second, recoveries/settlements premised on injuries to the Settlement Class will be shared pro rata in proportion to their investments and losses through distributions to the Settlement Class from the Litigation Trust. The amount of the Settlement Fund distributed to

Class Members who are eligible to receive a payment will be determined in accordance with the terms of the Amended Distribution Plan.

To the extent an individual or entity sustained no losses from his, her, or its investment in the Sunwest Enterprise, has already been fully compensated for his, her or its losses, or has settled with the Sunwest Enterprise or the Receiver on some independent basis apart from this Settlement Agreements and released any claims against Defendants then that investor's claim will likely be denied by the Claims Administrator.

Assessment of a plan of allocation in a class action is governed by the same standard applicable to the settlement as a whole—the plan must be fair, reasonable, and adequate. *See In re Ikon Office Solutions*, 194 F.R.D. 166, 184 (E.D. Pa. 2000); *Class Plaintiffs*, 955 F.2d at 1284-85. District courts enjoy "broad supervisory powers over the administration of class-action settlements to allocate the proceeds among the claiming class members . . . equitably." *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978); *accord In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 238 (5th Cir. 1982). An allocation formula need only have a reasonable, rational basis, particularly if recommended by "experienced and competent" class counsel. *White v. NFL*, 822 F. Supp. 1389, 1420 (D. Minn. 1993); *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 596 (S.D.N.Y. 1992). Here, the Plan of Allocation is consistent with the terms of the Amended Distribution Plan. The Plan of Allocation will result in a fair distribution of the available proceeds among those class members who submit valid claims and therefore should be approved.

D. Certification of the Settlement Class under Federal Rule of Civil Procedure 23 is Appropriate

In order to go forward with the settlement approval process, it is necessary that the Court certify the actions as a class action for purposes of settlement. Federal Rule of Civil Procedure 23 provides that an action may be maintained as a class action if each of the four prerequisites of Rule 23(a) is met and, in addition, the action qualifies under one of the subdivisions of Rule 23(b). Rule 23(a) provides that:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Rule 23(b) provides, in relevant part:

> A class action may be maintained if Rule 23(a) is satisfied and if: . . . (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

As set forth below, all of the requirements of Rule 23 are easily met and certification of the Class is clearly appropriate here.

1. The Class Is Sufficiently Numerous

Federal Rule of Civil Procedure 23(a) first requires that the proposed class be so numerous that joinder of all members is difficult or impracticable. Fed. R. Civ. P. 23(a)(1). "[I]n general, courts have held that joinder is practicable where there are less than 25 parties, and impracticable where there are more than 35." *In re THQ, Inc. Sec. Litig.*, No. 00-1783, 2002 U.S. Dist. LEXIS 7753, at *9 (C.D. Cal. Mar. 22, 2002). Here, while the precise number of the Class Members is unknown, there are more than one thousand Oregon limited liability companies within the Settlement Class. Specifically, 1,908 potential Class Members were identified by the Claims Administrator during the notice process. Grassmueck Decl. ¶ 2. Therefore, joinder is certainly impracticable.

2. Common Questions of Law or Fact Exist

Federal Rule of Civil Procedure 23(a)(2) requires that there be "questions of law or fact common to the [members of the] class." Fed. R. Civ. P. 23(a)(2). Like all the requirements of Rule 23(a), the commonality requirement is construed liberally: '"[T]hose courts that have focused on Rule 23(a)(2) have given it a permissive application so that common questions have been found to exist in a wide range of contexts.' The rule does not require all questions of law and fact to be common." *Rodriguez v. Carlson*, 166 F.R.D. 465, 472 (E.D. Wash. 1996) (citations omitted); *see also Schneider v. Traweek*, No. 88-0905, 1990 U.S. Dist. LEXIS 15596, at *16 (C.D. Cal. July 31, 1990). It is well-established that the commonality requirement is satisfied if the claims of the prospective class share even one central question of fact or law. *See, e.g., Hanlon*, 150 F.3d at 1019-20; *see also Yslava v. Hughes Aircraft Co.*, 845 F. Supp. 705, 712 (D. Ariz. 1993) ('"A common question is one which arises from a "common nucleus of operative facts" regardless of whether the underlying facts fluctuate over the class period and vary as to individual claimants.'") (quoting *In re Asbestos School Litig.*, 104 F.R.D. 422, 429 (E.D. Pa. 1984)).

These actions present numerous common questions of both law and fact, including, *inter alia*:

- Issues relating to the nature of the scheme involving investments in the Sunwest Enterprise that was being implemented by Sunwest Management, Inc.;
- Issues relating to the involvement of Defendants in the sales to members of the Plaintiff Class;
- Issues relating to the true financial conditions of the Sunwest Enterprise, the Receivership Entities, and Harder and Fisher;
- The failure to disclose to investors that each specific investment was dependent on the financial condition of the Sunwest Enterprise and the Receivership Entities;

- The failure to disclose to investors that funds from these investments in specific projects were being used by other, less profitable projects and by the Sunwest Enterprise;
- The failure to disclose Harder's and Fisher's financial commitments and economic position and the potential risks this created that they would not perform on their personal guarantees for the mortgage loans;
- The failure to disclose information from Jeffrey R. Krauss, the former Sunwest Chief Financial Officer;
- The failure to disclose Sunwest's purported plan to increase occupancy rates;
- Whether Defendants could show that they did not know and, in the exercise of reasonable care, could not have learned the facts on which the liability of the sellers is based.
- The value of any recovery on the security in the Receivership.

Accordingly, common questions of law and fact exist in these action such that certification as a consolidated class action is appropriate.

3. Plaintiffs' Claims are Typical of Those of the Class

The typicality requirement is satisfied where, as here, "each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir. 1992). Typicality does not require that the interests of the named representatives and the class members be identical. *Phillips v. Joint Legislative Comm. on Performance & Expenditure Review*, 637 F.2d 1014, 1024 (5th Cir. 1981). "[T]he test of typicality is 'whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" *In re THQ*, 2002 U.S. Dist. LEXIS 7753, at *12 (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)).

Typicality is met because the Class Representatives purchased investments pursuant to the same fraudulent scheme; were subject to the same or virtually the same omissions and misrepresentations; were all involved in transactions in which the Plaintiffs allege that Defendants participated or provided material assistance; and suffered the same types of harms as other members of the Settlement Class. Indeed, the SEC's review of Sunwest's records and transactions concluded that Sunwest's "securities offerings to investors had virtually identical structures" and were, for example, led to believe that returns were "dependent on the financial performance of the specific facility," Complaint at ¶¶ 27, 36, *SEC v. Sunwest Mgmt., Inc.*, No. 6:09-cv-06056-HO (D. Or. Mar. 2, 2009) (Docket No. 1).

4. Plaintiffs Are Adequate Representative of the Class

The adequacy requirement "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). "The Ninth Circuit has held that representation is 'adequate' where (1) counsel for the class is qualified and competent, (2) the representatives' interests are not antagonistic to the interests of absent class members, and (3) it is unlikely that the action is collusive." *Schlagel v. Learning Tree, Int'l.*, No. CV 98-6384, 1999 U.S. Dist. LEXIS 2157, at *6 (C.D. Cal. Feb. 23, 1999).

Here, there are no conflicts between the Plaintiffs and absent Class Members; as noted above, their claims arise from a common course of conduct and they would be proven with the same evidence. Plaintiffs are also adequate as demonstrated by the fact that they have retained experienced counsel to bring these actions against Defendants. Accordingly, both Plaintiffs and their Counsel are more than adequate to represent the Class.

5. The Requirements of Rule 23(b)(3) Are Also Satisfied

Rule 23(b)(3) authorizes certification where, in addition to the prerequisites of Rule 23(a), common questions of law or fact predominate over any individual questions and a class action is superior to other available means of adjudication. *Amchem*, 521 U.S. at 591-94. "Predominance is a test readily met in certain cases alleging consumer or securities fraud or

violations of the antitrust laws." *Id.* at 625. In this case, the common questions of law and fact identified above predominate because the proof for the claims of misrepresentation, materiality, reliance, and Defendants' scienter are all based on a common nucleus of fact and common course of conduct.

In analyzing whether common questions predominate, the Court must evaluate whether proving the elements of the Plaintiffs' claims can be done through common questions of fact or law, or whether the proof will be overwhelmed with individual issues. *See Hanlon*, 150 F.3d at 1022. The predominance inquiry tests "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 594. "The commonality requirement of Rule 23(a)(2) and the predominance requirement of Rule 23(b)(3) are closely related and a fining [sic] of one generally will satisfy the other." *Villareal v. Snow*, No. 95-CV-2484, 1996 U.S. Dist. LEXIS 667, at *15 (N.D. Ill. Jan. 16, 1996). The focus of Fed. R. Civ. P. 23(b)(3)'s predominance test is on whether the Class claims arise out of the same legal or remedial theory – "a common legal grievance." *Hochschuler v. G. D. Searle & Co.*, 82 F.R.D. 339, 349 (N.D. Ill. 1978); *see also Hanlon*, 150 F.3d at 1022.

Courts generally find that securities fraud class actions easily satisfy the predominance requirement. *See, e.g., In re United Energy Corp. Solar Power Modules Tax Shelter Investments Sec. Litig.*, 122 F.R.D. 251, 256 (C.D. Cal. 1988)) (finding that common questions such as the knowledge of the defendants and the truth or falsity of their representations predominated over individual questions); *In re Unioil Sec. Litig.*, 107 F.R.D. 615, 622 (C.D. Cal. 1985) (holding that common questions predominated where the plaintiffs' claim was based on a common nucleus of misrepresentations, material omissions and market manipulations). Thus, as these actions allege schemes of misrepresentations, the predominance element is satisfied here.

The second prong of Rule 23(b)(3) is also met here because a class action is the superior method of adjudication of these matters. The alternative – litigation of numerous, separate actions by individual members of the Class – would create a risk of inconsistent or varying adjudications and could also substantially impair or impede the ability of other members of the

Class who are not parties to those adjudications to protect their interests or recovery from Defendants. As courts in this District have recognized, the class action device also promotes efficiency by, for example, decreasing expenses and eliminating duplications of discovery. *See Phelps v. 3PD, Inc.*, 261 F.R.D. 548, 563 (D. Or. 2009) ("I agree with plaintiffs that a class action is superior given the increased expenses, duplication of discovery, and potential for individual actions should each [class member] have to pursue his or her claims individually."). Resolution on a class basis contemporaneously with resolution of the Receiver's claims also assures the finality that Defendants have sought as a basis for resolving the claims. Finally, as explained in *Amchem*, "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, *see* Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial." 521 U.S. at 620. Thus, any manageability problems that may have existed here – although Plaintiffs know of none – are eliminated by the Settlements.

Accordingly, for all of the reasons detailed herein, it is appropriate to certify these actions as a single, consolidated class action.

IV. CONCLUSION

For all of the above reasons, Plaintiffs respectfully request that the Court grant final approval of the Settlements, approve the proposed Plan of Allocation, and certify the putative Settlement Class.

Dated: December 21, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2010, copies of the foregoing were electronically served on counsel of record in this matter who are registered with the Court's ECF filing system through ECF notification.

/s/ Justine Fischer
Justine Fischer