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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. SUNWEST MANAGEMENT, INC., CANYON CREEK DEVELOPMENT, INC., CANYON CREEK FINANCIAL, LLC, AND JOHN M. HARDER, Defendants, DARRYL E. FISHER, ET AL., Relief Defendants.	Case No. 09-6056-HO **MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF RECEIVER MICHAEL A. GRASSMUECK'S MOTION FOR APPROVAL OF SETTLEMENTS WITH DAVIS WRIGHT TREMAINE LLP, K&L GATES LLP, AND THOMPSON & KNIGHT LLP, AND FOR ENTRY OF FINAL CLAIMS BARS** Oral Argument Requested Hearing Date: February 4, 2010

MICHAEL GRASSMUECK, Receiver, Plaintiff, vs. DAVIS WRIGHT TREMAINE LLP, a Washington limited liability partnership, Defendant.	Case No. 09-CV-0651-HO
MICHAEL GRASSMUECK, Receiver, Plaintiff, vs. K&L GATES LLP, a Delaware limited liability partnership, Defendant.	Case No. 09-CV-06202-HO
MICHAEL GRASSMUECK, Receiver, Plaintiff, vs. THOMPSON & KNIGHT, LLP, a Texas limited liability partnership, Defendant.	Case No. 09-CV-06199-HO

MEMORANDUM OF POINTS AND AUTHORITIES

The Receiver seeks approval of the Settlements and Settlement Agreements with Davis Wright Tremaine LLP ("DWT"), K&L Gates ("KLG"), and Thompson & Knight ("T&K"),[1/] and entry of a Final Claim Bar Order as to each of those

[1/] The Settlement Agreements include certain defined terms that are used in this Memorandum, including:

"Claim" or "Claims" means claims for relief, actions, causes of action, suits, cause of suits, demands, liens, administrative proceedings, governmental investigations, fines, penalties, sanctions, and any other basis for legal liability.

parties. Although approval is sought pursuant to a single joint Motion, the Receiver respectfully requests that the Court consider each Settlement and Final Claim Bar Order on its own merits.

I. BACKGROUND

A. The Receivership

Pursuant to orders entered by this Court March 10, 2009, May 27, 2009, and August 28, 2009 ("Receivership Orders") in *SEC v. Sunwest Management, Inc.*, Case No. 09-6056-HO (the "SEC Action"), Michael A. Grassmueck is the duly appointed and acting receiver for Sunwest Management, Inc., Canyon Creek Development, Inc., Canyon Creek Financial, LLC, Fuse Advertising, Inc., KDA Construction, Inc., and other entities named in the Receivership Orders (the "Receivership Entities"). On October 2, 2009 the Court entered an order approving

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"Investor Claimants" means entities, owners of such entities, and other persons or their successors who invested or formerly invested in one or more Sunwest Affiliates. This definition includes all persons who have asserted or have grounds to assert Claims against the settling defendants arising from or relating to their investments in Sunwest Affiliates. Investor Claimants includes persons whose investment consisted of a TIC or other interest in real property intended to be used by or provide a benefit to a Sunwest Affiliate. Investor Claimants also include all persons whose investment consisted of a membership interest in a limited liability company that was utilized in connection with a Sunwest Affiliate.

"Sunwest Affiliates" refers to Sunwest Management, Inc., Canyon Creek Development, Inc., and Canyon Creek Financial, LLC, and all business entities affiliated with or having common ownership with those firms. Sunwest Affiliates include all entities placed under the control of the Receiver in the SEC Action.

"The Litigation" refers to all lawsuits referenced in the definition section and in the Recitals of the Settlement Agreements.

"Final Approval" means the certification by each of the settling defendants DWT, KLG and T&K in their respective discretion in accordance with Oregon Law, that the settlement has been fully performed to their satisfaction, that its Settlement Agreement has resulted or will result in global resolution of all Claims, including Claims of governmental agencies, departments, entities, and subdivisions (such as the SEC, United States Department of Justice and State of Oregon regulators) against DWT, KLG, and/or T&K, arising from or relating to the legal services that each of them provided and any other conduct of the Settling Defendants in connection with one or more Sunwest Affiliates.

and establishing a Distribution Plan in the SEC Action. Among other things, the Receivership Orders and the Distribution Plan authorized the Receiver to pursue claims of the Receivership Entities against third parties for the benefit of investors and creditors of the Receivership Entities. The Distribution Plan created a Litigation Trust for amounts recovered on any such Claims.

B. Proposed Settlements Subject to this Motion.

The Receiver subsequently filed three actions against the law firms alleging claims arising from services that those firms provided to one or more of the Receivership Entities:

1. *Grassmueck v. Davis Wright Tremaine LLP*, Case No. 09-CV-0651-HO ("DWT Action");

2. *Grassmueck v. K&L Gates, LLP*, Case No. 09-CV-06202-HO ("KLG Action"); and,

3. *Grassmueck v. Thompson & Knight LLP*, Case No. Case No. 09- CV-06199-HO ("T&K Action").

Each of the defendants in those Actions has denied, and continues to deny, all material allegations of the Complaint filed by the Receiver against it and has indicated an intent to defend the Action as to it vigorously. The Receiver participated in separate mediations with each defendant regarding claims alleged by the Receiver and Investor Claimants who were not otherwise represented by counsel in the mediation and negotiations. The Receiver was authorized to employ Esler Stephens & Buckley as special litigation counsel to assist with respect to claims by unrepresented investors in each mediation. Other represented Investor Claimants were entitled to and participated in the mediation to the same extent as the Receiver. Following extensive document discovery and a number of witness interviews, the mediations resulted in agreement on basic terms of separate settlement agreements between the Receiver and certain Investor Claimants, on the one hand, and each of the three law firms, on the other hand.

The settlement terms were read into the record confidentially at the conclusion of each mediation. The parties then prepared more detailed written agreements containing the terms and conditions of each settlement. The Settlement Agreements require the parties to seek Court approval of the Settlement in each of the three Actions, as well as in the SEC Action. In addition, the Settlement Agreements required the Investor Claimants to file class actions styled *Robert T. DeVaney v. Davis Wright Tremaine,* Case No. 10-CV-6134-HO and *Houghmaster v. K&L Gates LLP, et al*. Case. No. 10-CV-06321. (the "Settlement Class Actions") for the purpose of certifying a settlement class and seeking approval of the Settlement. The process for certifying and obtaining approval of the Settlement Class Actions is being conducted simultaneously with the Settlement Approval Motion.

The Settlement Agreements also call for the Receiver to seek Final Claim Bar Orders in the federal court proceedings. The Final Claim Bar Orders would bar or enjoin enumerated persons from asserting Claims against each of the settling defendants arising from or relating to the legal services they provided to, and any other conduct in connection with, one or more of the Receivership Entities. The Final Claim Bar Orders would be binding on the Receiver, on all Investor Claimants, on all defendants in the litigation other than the settling defendants, on all Sunwest Affiliates, on all creditors of Sunwest Affiliates, and on all other professionals who provided services to Sunwest Affiliates and who receive notice of the Order. Each of the settling defendants has stated that it would not enter into the Settlement without such provisions.

The Receiver, on behalf of the Receivership Entities, and the settling defendants intend through the Settlement Agreements to fully and finally resolve any and all claims in the DWT Action, the KLG Action, and the T&K Action, to dismiss each of those actions with prejudice, and to enter into mutual releases. In consideration for the mutual releases and other actions described in the Settlement

Agreements, the settling defendants will make payments to the Litigation Trust established by the Distribution Plan in the SEC Action in the following amounts:

- DWT - $30 million
- KLG - $15 million
- T&K - $7.5 million

The Distribution Plan requires assignment to the Receiver of a Claimant's right to assert Claims against, among others, third parties, including attorneys, as a condition to receiving any Plan Distribution; Claimants seeking to "opt out" and pursue Claims against the settling defendants will not be entitled to receive Plan Distributions. The Settlement Agreements also require the Receiver to obtain written acknowledgements by Investor Claimants of the assignment of Claims against the settling defendants and other persons released in the Settlement Agreements.

II. RELIEF REQUESTED

The Receiver asks the Court to enter a Settlement Order that will approve each of the Settlements and the Settlement Agreements and enter Final Claim Bar Orders as to each settling defendant. Specifically, the Receiver respectfully requests that the Court,

(1) Find and conclude that adequate notice of this Settlement Approval Motion and due process was afforded to all interested parties including all investors and creditors of the Receivership Entities, all Investor Claimants as defined in the Settlement Agreements, all defendants in the Litigation, all Sunwest Affiliates and their creditors, and all professionals who provided services to Sunwest Affiliates;

(2) Find and conclude, as to each Settlement, that the Settlement and the Settlement Agreement are fair and equitable;

(3) Approve each of the Settlements and the Settlement Agreements and authorize the Receiver to perform the Settlements;

(4) Order that, except as otherwise provided in the Settlement Agreements or as otherwise provided in the proposed Settlement Approval Order, Claims by third parties against the settling defendants are barred;

(5) Stay each of the DWT Action, the KLG Action, and the T&K Action, until the requirements of the Settlement Agreements are completed;

(6) Retain jurisdiction over the matter; and,

(7) Determine that the Settlement Order is a final decision under Rule 54(b) of the Federal Rules of Civil Procedure.

III. EVIDENCE RELIED UPON

The Motion relies on the following evidence in support:

1. The Settlement Agreements, which are attached to the Motion to Approve;

2. The Declaration of Michael A. Grassmueck in support of the Motion; and,

3. The records and files in the DWT Action, the KLG Action, the T&K Action, and the SEC Action.

IV. SUPPORT FOR THE MOTION

The Receiver believes that each of the Settlements and Settlement Agreements is in the best interests of the investors and creditors of the Receivership Entities. The factors that led to this conclusion by the Receiver include: (1)) The time and risks associated with both pursuing the litigation and collecting a judgment (such as appeals and bankruptcy filings) are significant; (2) the additional cost to the receivership estate of further pursuing the pending litigation against each settling defendant would be substantial, and the costs of defense would continue to erode the available insurance coverage under each firm's applicable professional liability policies; and (3) the certainty of receiving substantial funds for the Litigation Trust under the Distribution Plan is of great benefit to investors and creditors.

In sum, the Receiver has balanced the risks of litigation and actual recovery and concluded that, considered individually and as a group, these Settlements are in the best interests of the investors and creditors.

V. ARGUMENT

A. The Settlements Should Be Approved Because They Are In The Best Interests Of Investors and Creditors.

In considering whether to approve a settlement or compromise in an equity receivership, a court generally should look for guidance in FRCP 16, Federal Rule of Bankruptcy Procedure 9019, and Bankruptcy Code § 105.

Courts recognize that equity receivers are to administer an estate as nearly as possible in accordance with the practice for the administration of estates in bankruptcy. *See C.F.T.C. v. Topworth International*, 205 F.3d 1107 (9th Cir. 2000); *In re Mumford, Inc.* 97 F.3d 449, 452, 455 (11th Cir. 1996). Court approval of a proposed compromise negotiated by a bankruptcy trustee "is an exercise of discretion that should not be overturned except in cases of abuse leading to a result that is neither in the best interests of the estate nor fair and equitable for the creditors." *In re MGS Marketing*, 111 BR 264, 266-267 (9th Cir. BAP 1990).

The Ninth Circuit has articulated four factors for courts to consider in approving a compromise of litigation brought by a bankruptcy trustee:

1. Probability of success in litigation;
2. The difficulties, if any, to be encountered in the matter of collection;
3. The complexity of the litigation and the expense, inconvenience, and delay necessarily attending; and
4. The paramount interest of creditors and a proper deference to their reasonable views.

In re Woodson, 839 Fed. 2d 610, 620 (9th Cir. 1988).

Each of the Settlement Agreements in this case satisfies those factors, and is fair and equitable to the creditors and investors of the Receivership Entities.

First, each of the settling defendants continues to dispute the claims alleged by the Receiver and to state an intention to defend all pending actions vigorously. The Receiver contends that damages sought in the DWT Action, the KLG Action, and the T&K Action substantially exceed the amount of each firm's available insurance coverage, and that the claims against each firm have merit as evidenced by the Complaint on file, and the investigation performed by the Receiver. Neither side can be certain of a particular outcome.

Second, absent the Settlements, difficulties are likely to be encountered in collecting any judgment that might be obtained by the Receiver. Beyond insurance proceeds from wasting policies, collection of a judgment against the settling defendants is problematic and could involve an extended process yielding uncertain results. For example, the collection of a substantial judgment from each firm and from individuals could be delayed or even defeated by appeals and bankruptcy filings.

Third, these matters involve complex litigation of claims covering, in some cases, at least six years and literally hundreds of transactions. Had the cases not been settled, the cost to prosecute the three Actions and related Litigation brought by or on behalf of Investor Claimants through trial and appeal would be substantial and the amount of available insurance coverage would continue to decline. The Litigation would consume significant judicial resources, in both this Court and the State Courts.

Fourth, the paramount interest of investors and creditors is best served by the Settlements, which provide a significant recovery. The Receiver recognizes the practical realities and risks involved and believes each of the Settlements is reasonable and appropriate in light of the potentially adverse factors discussed above. The Receiver further believes that the value to the receivership estate in the certainty of having funds paid as provided in the Settlement Agreements rather than after years of litigation is a positive factor which supports the Settlements.

B. A Federal Court Has Authority to Approve The Settlement And Bar Third-Party Claims.

Federal courts have a strong interest in facilitating settlement before trial. FRCP 16. "Since it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible." Fed. R. Civ. P. 16(c), Advisory Committee Notes. Further, a District Court supervising an equity receivership has "extremely broad" inherent equity power "to fashion effective relief." *S.E.C. v. Hardy*, 803 F. 2d 1034, 1037 (9th Cir. 1986); *S.E.C. v. Wenke*, 622 F. 2d 1363, 1369 (9th Cir. 1980). This equity power is at least as broad as the power of a bankruptcy court to enter an appropriate bar order. *Munford*, 97 F. 3d at 455 (relying on Section 105(a) of the Bankruptcy Code and Rule 16 to affirm bankruptcy court's entry of a bar order); *Fleet National Bank v. H&D Entertainment, Inc*., 926 F. Supp. 226, 240-42 & n. 56 (D. Mass. 1996) ("What is permitted under the Bankruptcy Code, generally is, therefore, a fortiori, permissible under the receivership law.").

As noted above, one significant obstacle to settlement has been the defendants' concerns that they may later be faced with third-party claims for indemnity, contribution, or other relief based upon the same facts and conduct that support the Receiver's claims and the pending claims by Investors. This is a reasonable concern. Unless a global settlement which resolves all potential Claims against a settling defendant can be reached, a settling defendant may not be able to reduce its financial exposure by entering into a particular individual settlement and, therefore, may have little incentive to do so. While such financial exposure theoretically can be terminated by a full settlement between all potential plaintiffs and a defendant, as a practical matter a comprehensive settlement directly with all potential third-party claimants may be impossible to orchestrate. *See Nelson v. Bennett*, 662 F. Supp. 1324, 1328-29 (E.D. Cal. 1987). And absent protection from

subsequent claims, parties willing to make substantial settlement payments cannot safely do so and a settlement can be held hostage to future unknown claims.

To overcome the obstacle to settlements posed by potential contribution, indemnity, and third party claims, a Federal Court can enter a "bar order," which is "a final discharge of all obligations of the settling defendants and bars any further litigation of claims made by non-settling defendants against settling defendants." *Franklin v. Kaypro Corp*., 884 F.2d 1222, 1225 (9th Cir. 1989); *see, e.g., In re Munford, Inc*., 97 F. 3d at 455 (affirming bar order that enjoined non-settling defendant from asserting against a settling defendant any claims for contribution or indemnification arising out of the adversary proceeding, or from plaintiff's state law claims for breach of fiduciary duty, negligence, mismanagement, corporate waste, and fraudulent conveyance); *Nelson*, 662 F. Supp. at 1334-1336 (bar rule is important tool in promoting settlements and fairness).

Here, the ability of the Receiver to collect a substantial payment through these settlements depends on entry of the requested bar order. Each of the settling defendants is prepared to pay substantial sums of money to the Litigation Trust to effect a global resolution of all pending and potential claims, but will not and cannot do so piece-meal. A bar order is appropriate on the facts of this case.

In short, these Settlements are fair and equitable to all settling parties and the investors and creditors of the Sunwest Affiliates. The requested Settlements should be approved, including the bar against claims by third parties against the released parties.

VI. PROPOSED SETTLEMENT ORDER

A draft of a Proposed Order Approving the Settlements and the Settlement Agreements, including the Final Claim Bar Orders, will be submitted separately for the Court's consideration.

VII. CONCLUSION

The Receiver respectfully requests that the Court enter an Order Approving the Settlements and Settlement Agreements and impose Final Claims bars.

Dated: November 1, 2010

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