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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
EUGENE DIVISION**

John E. Semasko, et al.

Plaintiffs,

v.

Thompson & Knight LLP, a Texas limited liability partnership and Geffen Mesher & Company, P.C., an Oregon professional corporation,

Defendant.

Securities and Exchange Commission,

Plaintiffs,

v.

Sunwest Management, Inc., et al,

Civil No. 10-CV-06335

MEMORANDUM IN SUPPORT OF
UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT

Civil No. 6:09-cv-06056

Defendants,

and

Darryl Fisher et al,

Relief Defendants.

TABLE OF CONTENTS

I. INTRODUCTION 1

II. BACKGROUND 2

III. THE PROPOSED SETTLEMENT CLASS SATISFIES THE REQUIREMENTS FOR CONDITIONALLY CERTIFYING A SETTLEMENT CLASS 5

 A. The Proposed Settlement Class, Class Representatives, and Class Counsel 5

 B. The Requirements for Certification of a Rule 23(b)(3) Settlement Class Are Satisfied..... 6

 1. The Settlement Class Satisfies Rule 23(a) 7

 2. The Settlement Class Satisfies Rule 23(b)(3) 0

IV. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE AND SHOULD BE PRELIMINARILY APPROVED..... 10

 A. The Standard for Preliminary Approval 10

 B. Terms of the Proposed Settlement 11

 C. The Proposed Settlement Warrants Preliminary Approval as Fair, Reasonable, and Adequate 13

 1. The Terms of the Agreement Favor Preliminary Approval..... 14

 2. The Risks Inherent in Continued Litigation and the Risks of Obtaining and Maintaining Class-Action Status through Trial Support Preliminary Approval..... 14

 3. The Stage of the Case Favors Preliminary Approval..... 16

V. THE PROPOSED NOTICE PROGRAM CONSTITUTES ADEQUATE NOTICE AND SHOULD BE APPROVED 16

 A. The Schedule Depends Upon the Fairness Hearing..... 17

 B. The Notice Program Will Provide the Best Practicable Notice, Including Individual Notice to All Identifiable Settlement Class Members..... 19

 C. The Proposed Notice Adequately Informs Settlement Class Members of the Class-Action Settlement..... 20

 D. The Notice Adequately Explains the Procedures to Request Exclusion or to Object..... 21

 E. The Notice Adequately Informs the Settlement Class Members of the Fairness Hearing 22

VI. CONCLUSION..... 22

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Amchem Prods., Inc. v. Windsor</i> , 521 U.S. 591 (1997).....	6, 10
<i>Churchill Village, LLC v. Gen. Elec. Co.</i> , 361 F.3d 566 (9th Cir. 2004)	11, 20
<i>Gay v. Waiters’ & Dairy Lunchmen’s Union</i> , 549 F.2d 1330 (9th Cir. 1977)	7
<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (9th Cir. 1998)	passim
<i>In re Pacific Enter. Sec. Litig.</i> , 47 F.3d 373 (9th Cir. 1995)	11
<i>Jordan v. L.A. County</i> , 669 F.2d 1311 (9th Cir. 1982)	7
<i>Lane v. Facebook, Inc.</i> , No. 08-3845, 2010 U.S. Dist. LEXIS 24762 (N.D. Cal. Mar. 17, 2010).....	9, 15
<i>Leyva v. Buley</i> , 125 F.R.D. 512 (E.D. Wash. 1989).....	7
<i>Nat’l Rural Telecomm. Coop. v. DIRECTV, Inc.</i> , 221 F.R.D. 523 (C.D. Cal. 2004)	16
<i>Officers for Justice v. Civil Serv. Comm’n</i> , 688 F.2d 615 (9th Cir. 1982)	1, 11
<i>SEC v. Sunwest Management, Inc.</i> , No. 09-CV-6056-HO (D. Or).....	passim
<i>Vasquez v. Coast Valley Roofing, Inc.</i> , No. 07-00227, 2010 U.S. Dist. LEXIS 21159 (E.D. Cal. Mar. 8, 2010).....	15
OTHER AUTHORITIES	
D. F. Herr, <i>Annotated Manual for Complex Litigation</i> (4th ed. 2005).....	passim
Fed. R. Civ. P. 23	passim

I. INTRODUCTION

The parties have entered into a Settlement Agreement that achieves a good result for the Plaintiffs in this action and plaintiffs the Court's preliminary approval of the Settlement. As the Court is aware, the parties engaged in limited discovery relating to these claims, followed by mediation before the Honorable Judge Velure (senior status), in an effort to determine whether this matter could be resolved on fair and reasonable terms. After the parties had an opportunity to review a large volume of relevant documents, evaluate the litigation risks and costs, and engage in mediation, the parties successfully negotiated a resolution of this matter. Accordingly, the accompanying Settlement Agreement is marked as Exhibit A, and respectfully Plaintiffs request that the Court grant preliminary approval for the class action settlement. As set forth below, the parties have also negotiated with the Receiver, so that any claims the estate may have are encompassed by the Settlement Agreement. The steps proposed by the parties to effectuate the Class Settlement will allow notice and claims administration to proceed in a manner that is coordinated with settlement and administration of the Receiver's other Third Party Claims.

At the preliminary approval stage, the Court need only "make a preliminary determination on the fairness, reasonableness, and adequacy" of the Settlement. D. F. Herr, *Annotated Manual for Complex Litigation* § 21.632 at 321 (4th ed. 2010) (hereinafter, the "*Manual*"). In so doing, the Court reviews the Settlement only to determine that the Settlement is not collusive and, "taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982).

The Settlement Agreement was the product of difficult negotiations and will fairly resolve this litigation through the conditional certification of a settlement class comprised of:

All individuals and entities that made investments in the Sunwest Enterprise¹ on or after January 1, 2002.² The securities 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.

The proposed Settlement Class meets all of the requirements for certification of a settlement class, and the proposed class notice program satisfies all of the requirements of Fed. R. Civ. P. Rules 23(c)(2)(B) and 23(e)(B), as well as due process, providing the best notice practicable under the circumstances to Settlement class members. Plaintiffs therefore move this Court for an order (1) conditionally certifying the Settlement Class, (2) granting preliminary approval of the proposed Settlement, (3) approving the proposed notice program and directing that notice be disseminated to the Settlement Class as provided therein, (4) appointing counsel for Plaintiffs to serve as Class Counsel, and (5) appointing Michael Grassmueck as the Claims Administrator.

II. BACKGROUND

The instant case is a class action brought by the Plaintiffs on behalf of a class of investor claimants who invested in a consolidated enterprise consisting of several hundred affiliated businesses owned by or under the financial control of Sunwest Management, Inc., Jon M. Harder (“Harder”), and/or Darryl E. Fisher (“Fisher”). These businesses were operated through closely affiliated and interrelated entities and individuals, most of which have been consolidated in *SEC v. Sunwest Management, Inc.*, No. 09-CV-6056-HO (D. Or.) (“*SEC v. Sunwest*” or the “SEC

¹ The “Sunwest Enterprise” included Sunwest Management, Inc., Canyon Creek Development, Inc., Canyon Crest 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.

² Virtually all claims arise after that date and it is congruent with the other Third Party Claim Settlements, permitting a unified administration of the Litigation Trust.

Action”) and *In re Stayton SW Assisted Living, LLC, et al.*, No. 09-CV-6082 (“*In re Stayton*”). By Orders dated March 10, 2009 and May 27, 2009 in that litigation, Michael A. Grassmueck was appointed Receiver for most of these businesses. The Sunwest Enterprise included Sunwest Management, Inc. (“Sunwest”), Canyon Creek Development, Inc. (“CCD”), Canyon Creek Financial, LLC (“CCF”), Fuse Advertising, Inc., KDA Construction, Inc. (“KDA”), and numerous other affiliated single-purpose entities created to own and operate various senior living facilities and real estate developments.

In March 2009, the SEC filed suit against the Sunwest Affiliates and Jon Harder, as well as various relief defendants. *SEC v. Sunwest Management, Inc., et al.*, No. 09-cv-6056-HO (D. Or.). As set forth above, the Court placed certain Sunwest affiliates under the collective control of a Court-appointed Receiver, a chief restructuring officer, and a management committee.

On October 2, 2009, this Court entered Findings of Fact and Conclusions of Law in *SEC v. Sunwest* (Document No. 874). The Court found that “there is substantial evidence of the Sunwest Enterprise procuring and using funds in a commingled manner without the prior knowledge or consent of investors and creditors, and in a manner inconsistent with the representations to investors and creditors.” Findings and Conclusions ¶ 15. The Court also found that the “declarations and testimony in court of the witnesses proffered by Certain Coordinating Lenders do not credibly refute the evidence presented throughout this case by the SEC, the Receiver, and the CRO, and the evidence specifically presented in connection with the Approval Hearing, that misrepresentations were made to investors concerning the use of invested funds, that invested funds were commingled among the Receivership Entities, the Defendants, and the Relief Defendants, and that certain investment proceeds were used to make distributions

to prior investors.” *Id.* at ¶ 16. The Court was not requested to make any findings regarding the involvement of Geffen in these activities and made no findings about its involvement.

The putative class claim against Geffen was commenced in Oregon state court and removed to this court by Geffen’s co-defendants. The court instructed the parties to proceed with mediation before Judge Velure. The parties then proceeded with discovery (including review of voluminous Geffen documents and data base of Sunwest Enterprise documents maintained by the Receiver) over the course of several months for purposes of evaluating the claims against Geffen, their respective litigations positions, and the possibility of a mediated resolution. After engaging in this discovery, and subsequent mediation, the parties – including the Investor Plaintiffs and the Receiver – negotiated a settlement in principle, which was subsequently memorialized in the Settlement Agreement appended as Exhibit A.

As contemplated by the Settlement Agreement, The Parties now seek certification of the Class and approval of the Settlement Agreement for purposes of effectuating the settlement. The law firms of Stewart Sokol et al on behalf of the Receiver and Esler Stephens & Buckley, on behalf of the putative class, have coordinated these efforts – so that resolution of the claims including notice and judicial review of the Settlement Agreement, will proceed in an efficient manner to secure appropriate relief for injured parties while resolving all pending claims against Geffen.

The parties now respectfully submit the Settlement Agreement that resulted from the parties’ mediation and negotiations to the Court for preliminary approval. The parties will also describe the manner in which they intend to provide notice of the Settlement Agreement and, at an appropriate time, seek this Court’s final approval of the Settlement Agreement.

III. THE PROPOSED SETTLEMENT CLASS SATISFIES THE REQUIREMENTS FOR CONDITIONALLY CERTIFYING A SETTLEMENT CLASS

A. The Proposed Settlement Class, Class Representatives, and Class Counsel

Plaintiffs request that the Court conditionally certify, under Federal Rule of Civil Procedure 23(b)(3), the Settlement Class defined as follows:

All individuals and entities that made investments in the Sunwest Enterprise³ on or after January 1, 2002. The securities 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.

Plaintiffs also move the Court to designate the named plaintiffs in the Complaint filed in this Action as Class Representatives of the Settlement Class. Geffen agrees that the named plaintiffs in the Complaint satisfy the requirements for Settlement Class representatives, and that the appointment of the law firm of Esler, Stephens & Buckley as Class Counsel satisfies Rule 23(g).⁴

B. The Requirements for Certification of a Rule 23(b)(3) Settlement Class Are Satisfied

The Ninth Circuit has recognized that litigants may instigate lawsuits for the limited purpose of obtaining court approval of a certified settlement. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). When presented with a proposed settlement, a court must first determine whether the proposed settlement class satisfies the requirements for class certification

³ The “Sunwest Enterprise” included Sunwest Management, Inc., Canyon Creek Development, Inc., Canyon Crest 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.

⁴ Esler, Stephens & Buckley have worked closely with the Receiver to coordinate the settlement of this matter for the putative class and to do so in an efficient manner, benefiting both from the Esler Stephens & Buckley firm’s knowledge of Oregon securities law and extensive involvement in the *Sunwest* proceedings.

under Rule 23. *Id.* But in assessing those class-certification requirements, a court may properly consider that there will be no trial. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (“Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial.”).

1. The Settlement Class Satisfies Rule 23(a)

The parties agree that the proposed Settlement Class satisfies the four requirements of Rule 23(a) for purposes of settlement. Numerosity is met because there are more than one thousand Oregon limited liability companies within the Settlement Class. *See, e.g., Jordan v. L.A. County*, 669 F.2d 1311, 1319 (9th Cir. 1982) (finding class sizes of thirty-nine, sixty-four, and seventy-one sufficient to satisfy the numerosity requirement), *vacated on other grounds*, 459 U.S. 810 (1982); *Gay v. Waiters’ & Dairy Lunchmen’s Union*, 549 F.2d 1330 (9th Cir. 1977) (finding numerosity requirement to be met with approximately 110 potential class members); *Leyva v. Buley*, 125 F.R.D. 512, 515 (E.D. Wash. 1989) (allowing certification of a fifty-member class).

Commonality for purposes of Rule 23(a) exists among Plaintiffs because there are many shared legal and factual issues. *See Hanlon*, 150 F.3d at 1019 (“The existence of shared legal issues with divergent factual predicates is sufficient [to satisfy Rule 23(a) commonality], as is a common core of salient facts coupled with disparate legal remedies within the class.”). The common issues include for example:

- 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 Geffen in the audits of CCF Plaintiff Class;

- Issues relating to the true financial conditions of the Sunwest Enterprise, the Receivership Entities, CCF, and Harder and Fisher;
- Whether Geffen could show that it 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.

Typicality is met because the proposed 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 Geffen 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," *SEC v. Sunwest Management, Inc.*, Case N. 6:09-cv-06056-HO (March 2, 2009) (Doc. 1, ¶¶ 27, 36); see *Hanlon*, 150 F.3d at 1020 ("[C]laims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical."); *Lane v. Facebook, Inc.*, No. 08-3845, 2010 U.S. Dist. LEXIS 24762, at *11 (N.D. Cal. Mar. 17, 2010) (typicality was met where "all of the named Plaintiffs' and Settlement Class Members' claims arise from the operation of the Beacon program—a common course of conduct resulting in the same or similar alleged injuries").

In considering the adequacy requirement of Rule 23(a), the Court should resolve two questions: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 1020. Here, both questions show the adequacy of the proposed Class Representatives and proposed Class Counsel Esler, Stephens & Buckley.

There are no known conflicts between the proposed Class Representatives and the other class members or between the proposed Class Counsel and the class members. Moreover, the proposed Class Representatives and proposed Class Counsel have already demonstrated vigorous prosecution on behalf of the class, both through their work in the other Third Party Claims and negotiation of an excellent result for the Settlement Class. *See Hanlon*, 150 F.3d at 1022 (finding “counsel’s prosecution of the case sufficiently vigorous to satisfy any Rule 23(a)(4) concerns”). Accordingly, for purposes of the Joint Motion, the parties agree that the named plaintiffs and Class Counsel are adequate representatives of the Settlement Class under Rule 23(a)(4).

2. The Settlement Class Satisfies Rule 23(b)(3)

Certification of the class is appropriate under Federal Rule of Civil Procedure 23(b)(3) and the parties agree that the predominance requirement is satisfied. Indeed, the numerous common questions of law and fact discussed above easily predominate over any individual issues that may exist. Moreover, all of the parties have recognized the very significant benefits provided by resolution of this matter as a class action. Prosecution of 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 Geffen. Resolution on a class basis contemporaneously with resolution of the Receiver’s claims also assures the finality that has been a basis for resolving the many of Third Party claims. Although the case could also have been appropriately tried on this basis (if a settlement had not been successfully negotiated), the Supreme Court has explained that a settlement class need not be manageable as a trial class action in order to be certified as a settlement-only class. *See Amchem*, 521 U.S. at 619. Thus,

irrespective of whether this case would be maintainable as a trial class, it can be certified as a settlement class because all of the requirements of Rule 23(a) and all of the relevant requirements of Rule 23(b)(3) have been met in the settlement context.

Accordingly, the Court should conditionally certify the Settlement Class proposed by the parties.

IV. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE AND SHOULD BE PRELIMINARILY APPROVED

A. The Standard for Preliminary Approval

The preliminary-approval step requires the Court to “make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms” *Manual* § 21.632, at 321. At this preliminary-approval step, the Court must conduct a prima facie review of the relief provided by the settlement and the proposed notice to determine that notice should be sent to the Settlement class members. *See id.* Preliminary approval of a settlement should be granted if the proposed settlement falls within the range of what could be found “fair, adequate and reasonable” so that notice may be given to the proposed class and a hearing for final approval can be scheduled. *Officers for Justice*, 688 F.2d at 625.

The Court’s review is “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.” *Id.*; *accord Hanlon*, 150 F.3d at 1027. In making this determination, the Court should evaluate the fairness of the settlement in its entirety. *See Hanlon*, 150 F.3d at 1026 (“It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness.”). The decision to grant preliminary approval is committed to the Court’s sound discretion. *See Officers for Justice*, 688 F.2d at 625. Settlements of complex

class actions prior to trial are strongly favored. *See Churchill Village, LLC v. Gen. Elec. Co.*, 361 F.3d 566, 576 (9th Cir. 2004); *In re Pacific Enter. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995).

B. Key Terms of the Proposed Settlement

Under the terms of the Agreement, Geffen has agreed to pay \$1,350,000.00 into the previously established Litigation Trust from which Settlement class members will be paid. Ex.

A ¶ 5.1. These funds will be allocated as follows, subject to approval of this Court:

- Reasonable attorney fees and costs, in an amount determined by the Court, will be paid to counsel for the class and individual plaintiffs who have brought claims against Geffen;
- The remaining funds shall be distributed by the Litigation Trust to the Class in accordance with the terms of the Amended Distribution Plan, subject to final approval by the Court.⁵

In exchange, the parties to the Agreement agreed to seek Court approval of the Settlement and binding judgments of dismissal in favor of Geffen in this action. *Id.* ¶¶ 6.1, 6.3. The Receiver also intends to seek entry of a final bar order in one or more of the actions prohibiting certain persons from asserting claims against Geffen arising from or relating to conduct by Geffen in connection with the Sunwest Enterprise. *Id.* ¶¶ 2.8, 6.2. The Receiver, the Sunwest Enterprise, and the Plaintiff Class will release Geffen from all legal claims relating to its conduct in connection with the Sunwest Enterprise. *Id.* ¶ 9.3. Likewise, Geffen has agreed to

⁵ The Court has approved an Amended Distribution Plan which the parties propose should govern the distribution of the Settlement. *See SEC v. Sunwest Management, Inc.*, No. 09-CV-6056-HO (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. The Claims Administrator will calculate Class Members' distributions in accordance with the Amended Distribution Plan.

release the Receiver, the Sunwest Enterprise, and the Plaintiff Class from any such claims. *Id.* ¶ 9.4.

C. The Proposed Settlement Warrants Preliminary Approval as Fair, Reasonable, and Adequate

Three key factors warrant a preliminary finding by the Court that the Settlement is fair, reasonable, and adequate. First, the terms of the Agreement, which were the product of arm's-length negotiations, are fundamentally fair, reasonable, and adequate, and favor preliminary approval. Here, the Settlement Agreement was negotiated over the course of an extended mediation in which all parties were represented by very capable counsel. The terms and amount of the settlement were debated at length and, in the view of counsel, represent a reasonable compromise of the parties' respective positions. Second, the putative Settlement class members would face substantial risks of continued litigation, including procedural issues (such as class certification issues) and the vigorous defense of this litigation by Geffen. Third, a significant amount of discovery has been provided, so the parties and the Court can fairly assess the benefits of the proposed Settlement in light of the strength of the case.

1. The Terms of the Agreement Favor Preliminary Approval

The specific terms of the Agreement meet the standard for "overall fairness." *See Hanlon*, 150 F.3d at 1026. The Agreement provides the Settlement class members with a prompt and certain recovery of a very substantial sum. This is especially true given that the recovery may be able to be consolidated with recoveries from other Third Party Claims settlements and disbursed at the same time in one distribution. Moreover, in view of the fact that class members will also receive compensation based on their interests in the Receivership, as well as claims against other third parties, the settlement negotiated with Geffen is an important step in achieving significant compensation for investors and closure of the estate. In exchange for this

financial compensation, the parties have agreed to a release that is properly tailored to this case and is fair and reasonable.

2. The Risks Inherent in Continued Litigation and the Risks of Obtaining and Maintaining Class-Action Status through Trial Support Preliminary Approval

The substantial risks of continued litigation on the merits, as well as risks associated with obtaining (and, if obtained, maintaining) class-action status for trial, also warrant preliminary approval by the Court. It is clear that if litigated to trial, Geffen would vigorously contest liability and raise numerous legal challenges to Plaintiffs' claims. *Cf. Vasquez v. Coast Valley Roofing, Inc.*, No. 07-00227, 2010 U.S. Dist. LEXIS 21159, at *18-19 (E.D. Cal. Mar. 8, 2010) ("Another relevant factor [to fairness] is the risk of continued litigation balanced against the certainty and immediacy of recovery from the Settlement."). As a procedural matter, there is a risk that Geffen would argue that a class should not be certified, or if certified, that the class could not be maintained throughout a trial. *Cf. Facebook*, 2010 U.S. Dist. LEXIS 24762, at *17 ("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, Geffen has made clear that it would dispute the allegations that it participated in misconduct, that investors were unaware of the risks attending these investments, and whether Geffen 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 Geffen, Sunwest Enterprise officials, other third parties, and investors, and a protracted trial of this matter

involving significant risks for both sides. The Settlement Agreement provides 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).

3. The Stage of the Case Favors Preliminary Approval

Finally, the Agreement was made following sufficient fact discovery and litigation, and after extensive, arm’s-length negotiations by experienced counsel with the assistance of a skilled mediator. This action is closely related to various other actions that have been extensively litigated in this court. There has been significant fact discovery during the mediation of this litigation including, in particular, significant access to documents made available by Geffen as well as information obtained from the Receiver’s investigation. As a result, the parties and the Court are in a position to assess the strength of this case and the comparative benefits of the proposed Settlement. The progress in the litigation also favors approval of the Settlement as fair. *Cf. Hanlon*, 150 F.3d at 1026 (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 Agreement’s 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.”).

Based on the foregoing factors, the parties request that the Court determine that the Settlement proposal is “within the range of reasonableness required for a settlement offer,” 4

Newberg on Class Actions § 11:26 (4th ed. 2002), and grant preliminary approval of the Settlement subject to further consideration at the Fairness Hearing.

V. THE PROPOSED NOTICE PROGRAM CONSTITUTES ADEQUATE NOTICE AND SHOULD BE APPROVED

In determining the most cost-effective and appropriate manner to provide notice of the Settlement Agreement, the parties are cognizant of the role of the Receiver in administration of the Distribution Plan and the past certifications and notice procedures already undertaken. Plaintiffs believe that notice and claims administration should proceed in a coordinated manner, to avoid unnecessary expense to the Litigation Trust and to ensure that notice will be provided in a manner that both comports with legal requirements and minimizes any risk of confusion attending multiple notices. While the schedule is somewhat expedited, it will permit the Receiver to collect and aggregate these funds with the proceeds of other Third Party Claim settlements and make one distribution. Thus, the plaintiffs propose that the Court approve Michael Grassmueck as the Claims Administrator to handle implementation of the notice program and the claims filing process in accordance with the process described below.

A. The Schedule Depends Upon the Fairness Hearing

Plaintiffs' proposed schedule depends upon the Court's approval and scheduling of the Fairness Hearing. Plaintiffs propose that the Fairness Hearing – which can address both the fairness of the Class settlement as well as the Receiver's related claims – be scheduled not less than 30 days following entry of a Preliminary Approval Order. The key milestones and requested times for compliance are summarized below:

<u>Milestone</u>	<u>Time for Compliance</u>
Date by which the Claims Administrator shall cause a copy of the notice to be posted on the Receiver's website ("Notice Date")	7 days after Court's entry of preliminary approval order.

Deadline for submitting requests for exclusion	7 days before the Fairness Hearing
Deadline for filing memoranda in support of final approval of the Settlement and applications for attorneys' fees	7 days before the Fairness Hearing
Deadline for submitting objections or requests to appear at Fairness Hearing	7 days before the Fairness Hearing
Deadline for filing memoranda in response to any objections	3 days before the Fairness Hearing
Settlement Fairness Hearing	Not less than 30 days following entry of preliminary approval order

Once preliminary approval of a settlement is granted, notice must be directed to the Settlement class members. For class actions certified under Rule 23(b)(3), including settlement classes like this one, “the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B). In addition, Rule 23(e)(1) applies to any class settlement and requires the Court to “direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.” *Id.*

When a court is presented with a proposed class settlement, the class-certification notice and notice of settlement may be combined in the same notice. *Manual* § 21.633, at 321-22 (“For economy, the notice under Rule 23(c)(2) and the Rule 23(e) notice are sometimes combined.”). This notice will allow the Settlement class members to decide whether to opt out of or participate

in the class, and/or to object to the settlement and argue against final approval by the Court. *See id.* The proposed notice program here, which informs Settlement class members of their rights and includes a comprehensive plan for delivery of notice by publication and electronic or postal service constitutes the best notice practicable under the circumstances of this case.

B. The Notice Program Will Provide the Best Practicable Notice, Including Individual Notice to All Identifiable Settlement Class Members

Plaintiffs have proposed to a comprehensive notice program to ensure the best notice practicable is directed to the Settlement class members. To facilitate the notice process, the parties have agreed to request that the Court approve Michael Grassmueck as the Claims Administrator to handle the implementation of the notice program and the claims filing process. Grassmueck is already handling claims administration for claims against the receivership entities so he is well-suited to do so for the class claims as well. The parties have agreed to the form of the long-form as set forth in Exhibit B. The costs of preparing, printing, emailing, posting, and mailing the approved notice will be paid from the Litigation Trust.

The notice program provides for an official Settlement website on which copies of the Settlement Agreement, the notice, and other documents important to the case are available for Settlement class members to view and print. There is also a contact email and toll-free number for Settlement class members to contact the Claims Administrator if they have questions. Second, the notice program provides that the class notice, attached as Exhibit B, will be emailed to all the Settlement class members for whom electronic address information is known and mailed to all other class members at their last known address.

C. The Proposed Notice Adequately Informs Settlement Class Members of the Class-Action Settlement

As required by Rule 23(c)(2)(B), the proposed long-form notice “concisely and clearly state in plain, easily understood language:” (1) the nature of the action (*see* Ex. C at 6); (2) the Settlement Class definition (*see id.* at 1, 7); (3) the class claims, issues, and defenses (*see id.* at 6); (4) that if a Settlement class member desires, he may enter an appearance through counsel (*see id.* at 15); (5) that the Court will exclude from the Settlement Class any member who requests exclusion, stating when and how members may elect to be excluded (*see id.* at 12-13); and (6) the binding effect of a class judgment on Settlement class members under Rule 23(c)(3) (*see id.* at 11-12). Fed. R. Civ. P. 23(c)(2)(B).

In addition, to provide adequate notice of a class-action settlement, the notice should “generally describe[] the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.” *Churchill Village*, 361 F.3d at 574 (internal citations omitted). Here, the parties’ proposed notice adequately informs Settlement class members of the Settlement terms, and explains that when the Court considers final approval at the Fairness Hearing, Settlement class members may be heard about the Settlement. As explained below, it also informs objectors to file written objections with the Court and to give notice if they intend to appear at the Fairness Hearing. *Manual* § 21.633. Finally, Rule 23(h)(1) requires that notice of Class Counsel’s request for attorneys’ fees must be “directed to class members in a reasonable manner

D. The Notice Adequately Explains the Procedures to Request Exclusion or to Object

Notice of a class action settlement should alert class members of the procedures to request exclusion or object. *See Manual* §§ 21.312, 21.633. The proposed notice here notifies

Settlement class members of their right to exclude themselves from the Settlement Class by sending a written request for exclusion to the Claims Administrator. *See* Ex. C. The notice also advises Settlement class members of the requirements that the request must contain the signature of the Settlement class member; the Settlement class member's name, address, and telephone number; the amount of the Settlement Class Member's investment in Sunwest, and a specific statement that the Settlement class member wants to be excluded from the Settlement Class. *Id.* at 13. It also informs Settlement class members that a request for exclusion must be received no later than the date established by the Court. *Id.* It advises that in no event shall persons who purport to opt out of the Settlement as a group, aggregate, or class involving more than one claim be considered valid opt outs. *Id.*

In addition, the notice provides that Settlement class members who wish to object to the proposed Settlement, and/or appear in person or by counsel at the Fairness Hearing and be heard, must first mail objection letters to the Court, plaintiffs' Class Counsel, and Geffen's counsel, which must be mailed and received by the date established by the Court, and must include the Settlement class member's name, current postal address, and current telephone number; and must state the reasons for objecting to the Settlement. *Id.* Moreover, the notice alerts Settlement class members that objections to the Settlement will only be considered by the Court if the member follows the procedures set forth in the notice. *Id.*

The notice also informs Settlement class members that, pursuant to the Agreement, the Receiver intends to will seek entry of a final claim bar order that will protect Geffen from claims relating to the conduct of Geffen in connection with the Sunwest Affiliates. *Id.*

Consequently, the notice that will be provided to the Settlement class members under the proposed notice program fully apprises the Settlement class members of the procedures to request exclusion or to object.

C. The Notice Adequately Informs the Settlement Class Members of the Fairness Hearing

Notice of a Fairness Hearing should inform the class that they can present their views on the Settlement, as well as present arguments for and against the Settlement, when the Court addresses the fairness, reasonableness, and adequacy of a proposed settlement. *Manual* §§ 21.633, 21.634.

The parties' proposed long-form notice informs putative Settlement class members of the details of the Fairness Hearing. The notice provides the date to be set for the Fairness Hearing, and alert Settlement class members that if they send a timely, written request, they may appear at the Fairness Hearing in person or by counsel and be heard. Ex. C. The notice also provides a toll-free number that a Settlement class member can call for more information. That toll-free number will be administered by the Claims Administrator appointed by this Court. Hence, the proposed notice program adequately notifies the Settlement class members of the Final Fairness Hearing to be held before the Court.

VI. CONCLUSION

As explained in detail above, the putative Settlement Class meets the Rule 23 requirements for class certification; the proposed Settlement fairly resolves the putative Settlement class members' claims; and the proposed notice program constitutes the best notice practicable under the circumstances. Consequently, the named plaintiffs and Geffen respectfully move this Court to issue an Order (1) certifying the Settlement Class, (2) granting preliminary approval of the proposed settlement, (3) approving the proposed notice program and directing

that it be implemented, (4) appointing Class Counsel, and (5) appointing the Claims Administrator.

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