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UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON

SECURITIES AND EXCHANGE  
COMMISSION,

Plaintiff,

vs.

SUNWEST MANAGEMENT, INC.,  
CANYON CREEK DEVELOPMENT, INC.,  
CANYON CREEK FINANCIAL, LLC, and  
JON M. HARDER,

Defendants,

DARRYL E. FISHER, J. WALLACE  
GUTZLER, KRISTIN HARDER, ENCORE

Case No. 09-CV-6056-HO

MOTION FOR ORDER APPROVING  
CLAIMS PROCEDURES, ESTABLISHING  
CLAIMS BAR DATE, AND APPROVING  
OTHER RELATED RELIEF;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT THEREOF

Date: September 23, 2009

Time: 9:30 a.m.

Place: U.S. District Court

405 East Eighth Avenue

Eugene, OR 97401

**ORAL ARGUMENT REQUESTED**

MOTION FOR ORDER APPROVING CLAIM  
PROCEDURES, ETC.

INDEMNITY MANAGEMENT, LLC,  
SENET LEASING COMPANY, FUSE  
ADVERTISING, INC. KDA  
CONSTRUCTION, INC., CLYDE  
HAMSTREET, and CLYDE A . HAMSTREET  
& ASSOCIATES, LLC,

Relief Defendants.

Michael A. Grassmueck (the "Receiver"), the receiver appointed pursuant to this Court's Order Granting Preliminary Injunction and Appointing Receiver entered by this Court on March 10, 2009 (the "Receiver Order"), hereby moves this Court for an order (i) approving the procedure to be used by the Receiver for the solicitation, review and approval of Claims against the Receivership Entities,<sup>1</sup> the Receivership Estate, Sunwest-related Claims against the HFG Parties, and any Sunwest-related Claims against Sunwest employees arising from actions in the course and scope of their employment; (ii) fixing a date certain (the "Claims Bar Date") as the last date by which the Receiver must receive proofs of claim; (iii) approving the form and manner of notice of the Claims Bar Date and Proof of Claim Form to be sent to creditors, Investors and other parties in interest; (iv) approving the forms of Notice of Election for PM and LLC Investors, as defined and referenced in the Proposed Distribution Plan; (v) approving the form of TIC Election and Notice of Cancellation of TIC Election by TICs as defined and referenced in the Proposed Distribution Plan; and (vi) approving the form of Notice of Bare Land Election by Bare Land Investors as defined and referenced in the Proposed Distribution Plan.

## **I. INTRODUCTION**

The Receiver Order provides the Receiver with various rights, powers, and duties with respect to the Receivership Estate. Receiver Order, Dkt. No. 64, Art. III and IV. The Receiver's duties, responsibilities and activities include developing a plan for distributions to creditors and Investors.

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<sup>1</sup> Capitalized terms not defined herein shall have the meaning ascribed to them in the concurrently filed proposed Distribution Plan.

The Receiver, jointly with the CRO, has concurrently filed a proposed Distribution Plan. In connection with and pursuant to the proposed Distribution Plan, the Receiver believes that it is necessary and appropriate to establish the procedures for creditors and Investors to submit Claims, and for the Receiver to review, allow and object to Claims. Accordingly, the Receiver proposes the establishment of a Claims Bar Date and a Claims review and allowance process as proposed herein ("Claims Process"). The Receiver intends the Claims Process to be as efficient and transparent as possible, so that Claimants will better understand how their Claims will be classified and, consequently, what Distribution Plan treatment they are entitled to and what Plan Distributions they should reasonably expect.

## **II. APPROVAL OF CLAIMS PROCESS IS NECESSARY AND APPROPRIATE IN THIS CASE**

The Claims Process described herein will greatly assist the Receiver in determining the maximum amount of Allowed Claims, and ultimately, the Plan Distributions to be distributed to creditors and Investors holding Allowed Claims. Setting the Claims Bar Date as described below will enable the Receiver to make Plan Distributions promptly following the Effective Date of the Reorganization Plan.

### **A. Claims Bar Date**

The Receiver requests the Court to fix a date certain as the Claims Bar Date--the last date by which the Receiver must receive Proofs of Claim of any type against any of the Receivership Entities, Sunwest-related Claims against employees of a Receivership Entity arising from actions in the course and scope of their employment, or any Sunwest-related Claims against the HFG Parties. The setting of the Claims Bar Date is necessary in order to provide certainty and finality to the Claims Process and to allow for the implementation of the Distribution Plan and Reorganization Plan. Even if the Court were to not approve the proposed Distribution Plan, the Claims Bar Date is needed and beneficial. The Receiver proposes January 15, 2010, as the Claims Bar Date. This date will allow the Receiver to give at least ninety (90) days' notice to all creditors and Investors to submit their Proofs of Claim.

**B. The Proof of Claim Form**

Attached as Exhibit A is the proposed Proof of Claim Form that the Receiver asks the Court to approve for the submission of any and all types of Claims. The Proof of Claim Form is a useful form even if the proposed Distribution Plan is not approved. The proposed Claims Process allows for creditors and Investors to opt for email communications about their Proof of Claim and allows the submission of their Proof of Claim either by email or by U.S. Mail to the Receiver.

**C. Notice of Election Forms**

Attached as Exhibit B is the Election Form proposed for use by Electing PM and LLC Members and Partners, Electing TIC Investors, and Electing Bare Land Investors. The Receiver needs to distribute these forms so that elections allowed by the Distribution Plan can be exercised by the Claims Bar Date.

**D. Notice of Claims Bar Date**

The Receiver proposes to give notice of the Claims Bar Date and to provide copies of the Proof of Claim Form and Notice of Election Forms to all creditors and Investors in the Sunwest records and in the Harder Bankruptcy Case. The form of Notice of Claims Bar Date will be substantially in the form contained on Exhibit C. The Receiver also proposes to publish a notice regarding the Claims Bar Date in the legal notices section of the USA Today and The Oregonian at least two times: once in October and once in November 2009. The Receiver proposes to publish a notice in the form substantially similar to that attached as Exhibit D, subject to modification for size, clarity and cost. The Receiver will post the Notice of Claims Bar Date and Proof of Claim Form and Notice of Election Forms on each of the Receiver's, CRO's and Sunwest websites.

The Receiver believes that these efforts will ensure the broadest possible notice to potential Claimants.

**E. Review and Allowance of Submitted Proof of Claim Forms**

The Claims Process is necessary in order for the Receiver to determine the maximum amount of Claims that will be entitled to Plan Distributions of cash and securities. To accomplish this, the Receiver will perform a careful review of all timely submitted Proofs of Claim. The Receiver will compare the Proofs of Claim against the Sunwest Enterprise records and any other information previously received with respect to such Proofs of Claim. The Receiver will conduct such review in the most cost-effective manner practicable, including through utilizing the Receiver's staff, Sunwest staff, third-party staffing solutions, and professionals as the Receiver deems appropriate and necessary.

Following the Receiver's review of submitted Proofs of Claim, the Receiver will file a motion to establish an allowed Tranche A amount (MIMO portion) and classification for each Claim. Each Claimant will be afforded the opportunity to review and object to the Receiver's proposed allowed amount and classification prior to the Receiver's submission to the Court and, if not consensually resolved, each Claimant will be entitled to file an objection with the Court. The Court will determine the allowed Tranche A amount (MIMO portion) and the proper classification by utilizing Summary Procedures to ensure expeditious administration of the Receivership Estate.

**III. EFFECT OF FAILURE TO FILE PROOF OF CLAIM**

Any party who is required to file a Proof of Claim and otherwise fails to do so by the Claims Bar Date: (i) should not, with respect to any such Claim, be treated as holding an Allowed Claim against the Receivership Estate, (ii) should be barred, estopped and enjoined from asserting any Claim against the Receivership Entities, the Receivership Estate or upon Distribution Plan approval, against any Sunwest employee for conduct in the course and scope of such employment or against any Sunwest-related HFG Party; (iii) and should not receive any Plan Distribution on account of such Claim. This aspect of the requested order is essential to ensure finality and to allow for the timely and efficient administration of the Receivership Estate.

#### **IV. THIS COURT HAS BROAD EQUITABLE DISCRETION TO ESTABLISH PROCEDURES FOR THE ADMINISTRATION OF CLAIMS**

It is well settled that district courts supervising federal equity receiverships have broad discretion to adopt appropriate procedures to administer the assets of, and claims asserted against the receivership estate. SEC v. Capital Consultants, LLC, 397 F.3d 733, 738 (9th Cir. 2005); S.E.C. v. Hardy, 803 F.2d 1034 (9th Cir. 1986); S.E.C. v. Universal Financial, 760 F.2d 1034, 1037 (9th Cir. 1985). The Ninth Circuit recently explained:

A district court's power to supervise an equity receivership and to determine the appropriate action to be taken in the administration of the receivership is extremely broad. The district court has broad powers and wide discretion to determine the appropriate relief in an equity receivership. The basis for this broad deference to the district court's supervisory role in equity receiverships arises out of the fact that most receiverships involve multiple parties and complex transactions. A district court's decision concerning the supervision of an equitable receivership is reviewed for abuse of discretion.

Capital Consultants, 397 F.3d at 738 (citations omitted); see also Commodities Futures Trading Comm'n. v. Topworth Int'l, Ltd.; 205 F.3d 1107, 1115 (9th Cir. 1999) ("This court affords 'broad deference' to the court's supervisory role, and 'we generally uphold reasonable procedures instituted by the district court that serve th[e] purpose' of orderly and efficient administration of the receivership for the benefit of creditors."). Accordingly, this Court can approve the Claims Process set forth herein.

#### **V. SUMMARY PROCEDURES SHOULD BE USED FOR THE ADMINISTRATION OF CLAIMS**

Receivership courts have the general power to use Summary Procedures in allowing, disallowing, and subordinating Claims. United States v. Arizona Fuels, 739 F.2d 455, 458 (9th Cir. 1984); S.E.C. v. Hardy, 803 F.2d at 1040 (summary proceeding to approve categorization scheme re investors' claims was reasonable; fair notice and a reasonable opportunity to respond was given); S.E.C. v. Elliot 953 F.2d 1560, 1571 (11th Cir. 1992) (summary claim determinations upheld where claimants cannot demonstrate their rights would have been better protected by a fuller proceeding).

Summary procedures should be used to adjudicate the amounts and priority of claims asserted against the Sunwest Enterprise. Using plenary proceedings for the adjudication of claims would unnecessarily consume the assets of the Receivership Estate.

**VI. CONCLUSION**

The Receiver requests that this Court enter an order:

1. Setting the Claims Bar Date as January 15, 2010;
2. Approving the Proof of Claim Form and Notice of Election Form;
3. Approving the proposed form of Notice of Claims Bar Date and the proposed publication procedure and publication notice form;
4. Approving the Claims Process described above, along with the use of Summary Procedures to resolve Claim objections; and
5. Granting further relief as appropriate.

Dated: August 25, 2009

ALLEN MATKINS LECK GAMBLE  
MALLORY & NATSIS LLP

By: /s/ David L. Osias

David L. Osias  
Attorneys for Receiver  
Michael A. Grassmueck