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Attorneys for Sunwest Investors / Third-Party Claimants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON (Eugene)

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

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

Defendants,

and

DARRYL E. FISHER, J. WALLACE
GUTZLER, KRISTIN HARDER, ENCORE
INDEMNITY COMPANY, FUSE
ADVERTISING, INC., KDA
CONSTRUCTION, INC., CLYDE
HAMSTREET AND CLYDE A.
HAMSTREET & ASSOCIATES, LLC,

Relief Defendants.

USDC Case No. 6:09-cv-06056-HO

**AFFIDAVIT OF GARY I. GRENLEY IN
SUPPORT OF PETITION AND
STATEMENT FOR ATTORNEY FEES
AND COST BILL SUBMITTED BY
GRENLEY ATTORNEYS FOR
SUNWEST INVESTORS / THIRD-PARTY
CLAIMANTS**

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Page 1 – GRENLEY AFFIDAVIT IN SUPPORT OF PETITION & STATEMENT FOR ATTORNEY FEES
AND COST BILL FOR SUNWEST INVESTORS / THIRD-PARTY CLAIMANTS

responsible for at Samuels, Samuels, Yoelin & Weiner. As the Firm has developed over the last thirty years, litigation of securities and complex business and real estate cases has been our major strength. The Firm has always represented both plaintiffs and defendants in its litigation practice, and in the area of business litigation has worked on matters involving mergers and acquisitions, venture capitalization, LBOs and other financing arrangements, public offerings, private placements and IPS, broker-customer disputes (including arbitration before NYSE and NASD tribunals), broker-dealer regulation, banking and savings and loan matters, real estate acquisitions and dispositions, public and private syndications and joint ventures, corporate organization, reorganization and liquidation, shareholder disputes, general and limited partnership matters, director and officer responsibilities, and professional negligence.

6. I have tried a variety of contract and tort claims, securities and investment matters, construction defect, real estate and business disputes to both judge and jury, in state and federal courts in Washington and Oregon in my over thirty-five years of practice. These include commercial and residential design and construction cases, professional malpractice, real estate purchases and sales, employment issues, minority shareholder rights, securities, antitrust, sales of goods and services, brokerage disputes, trademark and trade name litigation, and business acquisition issues. I have also represented parties in a variety of dispute resolution forums, primarily arbitration and mediation.

7. I am currently a member of the American Bar Association, the Federal Bar Association, the Multnomah Bar Association, the Oregon Trial Lawyers Association, and the Oregon State Bar Association. I served as Chair of the Executive Committee of its Antitrust and Trade Regulation Section of the Oregon State Bar. I served as Chair of the Business Litigation Section of OTLA. I have also served on the Executive Committee of the Securities Regulation Section of the Oregon State Bar, the Executive

Committee of the Dispute Resolution Section of the Oregon State Bar, and the Executive Committee of the Oregon Chapter of the Federal Bar Association. I also served for three years as a member of the Multnomah Bar Judicial Screening Committee. I have acted as an arbitrator for both the Multnomah County Court system and the American Arbitration Association (Panel of Commercial Arbitrators). I have also written, lectured and planned continuing legal education-type publications and programs in several areas of law, including damages, securities, professional negligence and alternative dispute resolution. The Firm and I have maintained an "AV" rating with the Martindale-Hubbell Law Directory since 1989. I have been honored to be selected as an Oregon 'Super Lawyer' in securities litigation for the past several years.

8. In our prosecution of Third-Party Claims on behalf of Sunwest Investors, this Firm has rendered legal services with an hourly fee value of \$818,598.75 to date. Based on my legal experience, I believe that all the time incurred and legal services rendered in this litigation were reasonable and necessary. Since I have represented the Sunwest Investors for over two years now, having witnessed personally the financial devastation it has caused dozens of my clients, I have committed myself and my Firm to our representation of the Investors in the manner which is the most efficient and economical as possible. In the early stages of the Sunwest disaster, I and my Firm performed legal work on an hourly fee basis for over 400 individual clients who had invested in over 40 separate senior living facilities, ultimately writing off over \$100,000 of time we decided not to bill our clients. Once we commenced in September 2008 performing contingent fee legal services in pursuing Third-Party Claims, we continued to try to do so by spending time as efficiently and effectively as we could. Our efforts to gain as much money as we could for the benefit of Sunwest Investors net of legal fees and expenses continue to this day. For that reason, I tried to assign work to those in my Firm most capable but at the least expensive billing rate.

9. The number of hours and services rendered in this matter on a daily basis for each Firm member involved, and the hourly rates and fees charged for each, are set forth in detail in Exhibit 1 attached. Exhibit 1 is summarized as follows:

NAME	POSITION	HOURLY RATE	HOURS	FEES
Gary I. Grenley	Attorney	\$450	420.75	\$189,337.50
David E. Dean	Attorney	\$390	834.80	\$325,572.00
Paul H. Trincherro	Attorney	\$290	653.85	\$189,616.50
Jason E. Hirshon	Attorney	\$230	2.1	\$483.00
Patricia Brundidge	Paralegal	\$200	476.90	\$95,380.00
Thomas Purcell	Law Clerk	\$165	81.65	\$13,472.25
Judy Becker	Legal Assistant	\$50	94.75	\$4,737.50
		TOTAL	2564.80	\$818,598.75

10. This Firm has also spent the sum of \$37,768.86 for filing and witness fees, legal expenses, costs and disbursements in pursuing these Third-Party Claims, as detailed on Exhibit 1. These expenses and costs are normally billed directly to the client and are not overhead expenses already reflected in our hourly rate or fee. These “nontaxable costs” are recoverable under the rule of *Robinowitz v. Pozzi*, 127 Or App 464, 470, 872 P2d 993 (1994); and *Willamette Production Credit Ass’n. v. Borg-Warner Acceptance Corp.*, 75 Or App 154, 159, 706 P2d 577 (1985), *rev. den* 300 Or 477 (1986).

COSTS AND DISBURSEMENTS	AMOUNT
Filing and Court Fees	\$12067.00
Process and Messenger Service.	\$11404.32
Outside Copy Service	\$1607.25
Inside Copying Charges	\$1719.77
Fax Transmittal	\$23.00
Long Distance Expense	\$151.08

Postage Expense	\$1062.96
Express Delivery Service	\$512.43
Mileage	\$284.40
Professional Services [Stewart & Ass./audio conf]	\$448.93
Computer Research [Westlaw/Open Online]	\$8,487.72
TOTAL	\$37,768.86

11. Based upon the factors identified herein, the reasonable hourly rate for Gary Grenley is \$450 per hour, David E. Dean is \$390 per hour, and Paul H. Trincherro is \$290 per hour, Jason E. Hirshon is \$230 per hour, Patricia Brundidge is \$175 and \$200 per hour, Thomas Purcell is \$165 per hour and Judy Becker is \$50 per hour. These hourly rates are reasonable in this community for attorneys and support staff with comparable skills, reputation, and experience. I base this opinion upon my thirty-five years of experience in this legal community, my conversations with many local and west coast business litigators about hourly fees being charged, my attendance at CLEs on the issue of attorney fees, my experience in submitting and reviewing dozens of fee petitions, and my occasional testimony as an expert in contested attorney fee hearings. These were and are our normal hourly rates for this type of work in existence for the 2008 calendar year to the present.

12. Since over 80% of the legal fees incurred in pursuing Third-Party Claims by this Firm was time spent by me, David Dean and Paul Trincherro, I would also like to briefly outline the legal backgrounds of Messrs. Dean and Trincherro. David Dean graduated from Northwestern School of Law of Lewis & Clark College in 1981, and commenced practicing in the field of personal injury, construction and employment law. He was a named partner with firms which included outstanding plaintiff lawyers such as John Haugh and Jeffrey Foote for nearly 20 years. Mr. Dean joined our Firm in 1999 and commenced work on complex business litigation, including securities and real estate law. He is an invaluable member of our Sunwest litigation team and committed

himself to seeking the return of as much reimbursement as he could to the hundreds of Sunwest Investors, many of whom lost their entire life savings in the Sunwest scheme. Paul Trincherro has been with the Firm since he was a law clerk, becoming our litigation associate after graduating from Northwestern School of Law of Lewis & Clark College in 2001, *cum laude*. During law school, he was associate editor of the Environmental Law Review. Since joining this Firm, Mr. Trincherro has been a complex business litigator, practicing in state and federal court, with emphasis on violations of state and federal securities laws. Mr. Trincherro is currently Chair-Elect of the Oregon State Bar Securities Regulation Section as well as a member of its Executive Committee. He is also the Co-Chair of the Business Litigation Section of the Oregon Trial Lawyers Association. Mr. Trincherro was recently recognized as a 'Rising Star' in the 2010 Edition of Oregon 'Super Lawyers.'

13. By the 1990s, an informal hourly rate survey was commenced among business litigators in Portland, primarily by Dan Skerritt, David Markowitz, Milo Petranovich, now Circuit Court Judge Henry Kantor, and Robert Bonaparte. When a fee request was being considered, most of the business litigators in Portland contacted these gentlemen to determine prevailing hourly rates for business litigators in this area. In 2002, with the assistance of some of the aforementioned individuals, Portland certified public accountant Serena Morones commenced her own more formal survey, which she has compiled and issued every two years since then. I know from experience in seeking fee awards, in defending fee requests, and in discussing prevailing rates with commercial litigators in both plaintiff and defense practices that the Morones Survey is considered accurate and authoritative by most of the Portland business litigators I know. A copy of the most recent Morones Survey is attached hereto as Exhibit 2. The rates charged by me and the other members of this Firm are well within the average rates of surveyed commercial litigators with similar years of

experience.

14. The Court may also consider ORS 20.075 and the factors checked below in determining a reasonable attorney fee award:

- The novelty and difficulty of the questions involved.
- Skills requisite to perform the legal services properly.
- The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- Fees customarily charged in the locality for similar legal services.
- The amount involved and the results obtained.
- The time limitations imposed by the client or by the circumstances.
- The nature and length of the professional relationship with the client.
- The experience, reputation, and ability of the lawyer(s) performing the services.
- Whether the fee is fixed or contingent.

15. In mid-2008, I was contacted by first one, then several Sunwest Investors. Generally, I was told that they had invested in Sunwest senior living facility properties over several years, most as tenants-in-common ("TIC") as a result of conducting tax-deferred real estate exchanges. They also told me that their monthly payments of guaranteed return (usually 9% or 10%) had just been discontinued and a Sunwest presentation had been scheduled soon to explain the circumstances.

16. I attended the presentation by Sunwest in Lake Oswego at the Crown Plaza Hotel, and listened to Sunwest counsel Wally Gutzler explain why Sunwest had discontinued its monthly payments to Investors. It was made apparent that Sunwest had been "robbing Peter to pay Paul" by using money from one facility to pay for expenses at another facility as a practice, and not as an isolated incident. It was explained that this practice had been going on at Sunwest for quite some time and, when the real estate rescission took hold, Sunwest was incapable of paying expenses

when they became due at hundreds of its facilities across the country.

17. At that meeting and in subsequent telephone conversations and email communications, I was asked by dozens of Sunwest Investors to assist them in investigating the situation and helping them recover at least their monthly payments and perhaps their entire investment amounts. Through the remainder of the summer of 2008, I and my Firm investigated the situation and concluded that the prospects for the survival of Sunwest as a consolidated entity were dim. In addition to normal operating expenses which were not being paid, a great many lenders were foreclosing upon properties, appointing receivers, and applying severe financial pressure to Sunwest. As a result, it appeared to us that the best approach for many of our Investor clients was to try to secure control of their individual properties and remove them from the Sunwest organization to the extent their properties were in fact positive cash-flowing entities.

18. Our Firm was retained originally on an hourly fee basis by some 400 Sunwest Investors on behalf of over 40 individual facilities and asked to pursue taking those properties "independent" from Sunwest. Our efforts were short-lived once the Securities and Exchange Commission, the Receiver Michael Grassmueck, the substitute COO Clyde Hamstreet and ultimately the Court determined that the Sunwest operation had been conducted as a "unitary enterprise" and a "Ponzi scheme": since all of the finances of all of the Sunwest properties were intermingled, none of the individual properties would be recognized as a singular unit of real estate.

19. At about the same time the "unitary enterprise" became the inevitable conclusion, I was contacted by Kit Pierson and Herbert E. Adelman, who were working with Justine Fischer to prepare class action claims against Sunwest's main securities counsel, Davis Wright. I had worked in the past with Justine Fischer on securities cases. I was asked if I was agreeable to cooperate with them in prosecuting their class action case against Davis Wright, so that the litigation against that firm could proceed in

an efficient and coordinated manner. Since it had become apparent to me from my own investigation that all of the securities work and offerings conducted by Davis Wright had been on a consistent, uniform basis, I believed Davis Wright would be subject to class action treatment. Having filed and worked on a great number of both local and national class action cases in my career, it was quite evident to me that the uniform method of providing legal services to Sunwest and the “unitary enterprise” operation of the facilities would very likely subject Davis Wright to class-wide liability to the purchasers of interests in those Sunwest facilities. And since I believed a class case might be the most economical approach to collecting damages for Sunwest Investors, I agreed to cooperate.

20. In the meantime, we contacted several other firms in Oregon who had been contacted by other Sunwest investors. We started communicating and meeting regularly with three of those firms: Mike Esler and his firm, Paul Connolly from Salem, and Gary Kahn from Portland. The five individual law offices (I treat Kit Pierson and Justine Fischer as a single team) worked cooperatively over the next year or so, along with lawyers for the Receiver, Allen Matkins (primarily Steve Walters), to investigate the legal liability of Davis Wright. Mike Esler had filed a couple of cases against Davis Wright for his own clients, and took the lead role in spearheading the effort against Davis Wright.

21. Our Firm provided support for Mike Esler and Steve Walters by reviewing tens of thousands of pages of Sunwest and Investor documents and providing them with information and documents for their use in interviewing Davis Wright and Sunwest employees in a mediation-sponsored informal discovery process. Judges Hogan and Velure were particularly active and instrumental in conducting mediation quite quickly, advising the litigants that the emphasis would be on early but fair settlement in order to keep legal fees to a minimum. As a result, a settlement was achieved with Davis Wright

in late 2009 with a minimal amount of discovery (no formal depositions were taken) and only a few, efficient mediation sessions.

22. This Firm rendered legal services related to prosecution of Third-Party Claims for nearly a year through the end of 2009 with a lodestar value of about \$125,000. Some of this time was solely attributed to prosecution and settlement of the Davis Wright claim, such as our attendance at mediation sessions in the fall of 2009, most of which took place in Eugene. But I estimate that more than half this time spent in 2009 by our Firm was of equal benefit to the "second phase" of Third-Party Claim prosecution which commenced in mid-2009, focusing upon additional Sunwest lawyers K&L Gates and Thompson & Knight, real estate and securities brokers who were instrumental in sales of Sunwest investments, and Sunwest insiders improperly benefitting from such investments. Accordingly, our Firm commenced sending out dozens of Third-Party Claim notices starting in December 2008 to Sunwest lawyers, accountants, and brokers intended to "trigger" 2008 policies of insurance which were claims-made type policies.

23. By the end of 2008, many of our existing clients decided to engage our Firm to prosecute Third-Party Claims against Sunwest lawyers, accountants, brokers and insiders. They signed Contingency Fee Agreements by which they authorized our Firm to prosecute these claims to their conclusion, agreeing to compensation our Firm in the sum of 25% of all settlement and judgment monies collected. By mid-2009, we were phasing out of our support work on the Davis Wright phase and focusing our efforts on prosecuting Third-Party Claims against the other Sunwest lawyers, brokers and insiders. We initially engaged in a series of communications and meetings with co-counsel, the Receiver, members of the TIC Management Committee and Judge Velure concerning the right and advisability of the Receiver taking assignments of all Third-Party Claims from all Investors. Those efforts resulted in greater cooperative effort

among co-counsel prosecuting Third-Party Claims going forward, including the appointment by Judge Hogan of John Stewart to lead all future mediation efforts on behalf of Sunwest Investors' private counsel.

24. It was decided among Third-Party Claim counsel that, since Mike Esler's firm was spearheading Investor Claims against Davis Wright and Thompson & Knight, our Firm would take the lead on the remaining Third-Party Claims. In mid-2009, our Firm started filing cases against K&L Gates, LLP, its lead lawyer on the Sunwest securities engagement R. Gibson Masters, and their Sunwest liaison John D. Thurber. We initially filed five separate cases on behalf of individual property investors:

C Blass' Vista Pointe, LLC, et al v. K&L Gates, LLP, et al
Multnomah County Circuit Court Case No. 0905-07133
Filed: May 22, 2009

Allen's Atwater Land, LLC, et al v. K&L Gates, LLP, et al
Multnomah County Circuit Court Case No. 0909-13375
Filed: September 22, 2009

Anderson's French Quarter, LLC, et al v. K&L Gates, LLP, et al
Multnomah County Circuit Court Case No. 0909-13957
Filed: September 30, 2009

Dowling's Puyallup Land, LLC, et al v. K&L Gates, LLP, et al
Multnomah County Circuit Court Case No. 0909-13956
Filed: September 30, 2009

Gorman's Fort Bragg, LLC, et al v. K&L Gates, LLP, et al
Multnomah County Circuit Court Case No. 0909-13958
Filed: September 30, 2009

25. As the end of 2009 approached, we decided to file a class action complaint against K&L Gates and Mr. Masters in order to toll statutes of limitation on Third-Party Claims held by the hundreds of Sunwest Investors who had not yet filed their own claims against K&L Gates. We subsequently had that case designated complex by Multnomah County Presiding Circuit Judge Maurer and, by stipulation with K&L Gates defense counsel Stoel Rives, abated the case to allow for informal discovery

and mediation. The first K&L Gates mediation session I attended with Judge Velure was on May 13, 2009 and the second was June 8, 2009.

26. Our Firm engaged in much more activity in prosecuting this Claim against K&L Gates since the Stoel Rives defense was enthusiastic and its first settlement offer minimal. We took the lead in reviewing and furnishing to defense counsel voluminous sets of Investor documents covering multiple years and nine different Sunwest properties in which K&L Gates was involved, as well as preparing a number of Investors for interviews by defense counsel. We also reviewed over 600,000 pages of documents from Sunwest and its various attorneys collected in a large data base, prepared for and helped conduct interviews of designated defense witnesses. All of these activities resulted in the mediation-sponsored settlement with K&L Gates and Thompson & Knight which was reached September 2010.

27. At about this time, we started investigating the remaining potential Third-Party Claims against lenders, real estate and securities brokers, and Sunwest insiders. We determined that prosecuting Third-Party Claims against lenders would not be cost-effective, but that there were viable Claims against insured real estate and securities brokers which merited prosecution. We also determined that there were meritorious Claims to be brought against Sunwest insiders (those not protected by a bankruptcy stay or preliminary injunction) in instances where we found evidence of self-dealing and other conduct by which Sunwest employees gained significant interests in Sunwest-sponsored facilities and properties without paying any consideration for same. We continued sending claim notices to brokers and insiders in 2008-09, again in order to alert them and their insurers of the claims we were asserting on behalf of all Investors. We then initiated discussions with some of these brokers and insiders, and filed a few lawsuits against selected defendants.

28. Our first lawsuit was filed in Salem in July 2009 against a particularly

active real estate broker with very close ties to Sunwest and Jon Harder, entitled *E. Lloyd Hiebert, et al v. David Alexander Rhoten, Jr., et al*, Marion County Circuit Court Case No.09C17299. Almost a year later, we filed a mass lawsuit on behalf of 192 Investors against 62 separate real estate and securities brokers, entitled *35th Avenue's Rosemont 6, LLC, et al v. Richard Wiede, et al*, Marion County Circuit Court Case No. 10C16511. While all of the Plaintiffs in the *35th Avenue's Rosemont 6* case were and are clients of this Firm, the goal of this massive filing was to incentivize as many brokers, insiders and insurers as possible to quickly engage in meaningful settlement discussions and mediations. Mediations commenced in July 2010 and are currently ongoing and settlements are being reached. To the extent counsel for Sunwest Investors could gain insurance proceeds, we settled for those. In the case of insiders, most of whom were not insured for the conduct we alleged, we negotiated settlements based upon their relinquishment of all interests they had in Sunwest facilities and properties, and their release of claims they could make for Litigation Trust proceeds from sales of properties and settlement of other Third-Party Claims.

29. Based on all the facts and circumstances in this case, this Firm respectfully requests an award of reasonable and necessary attorney fees incurred in our work on behalf of Sunwest Investors these last two years in the sum of \$818,598.75, plus reimbursement of our out-of-pocket expenses, costs and disbursements in the sum of \$37,768.86. While this Firm was but one member of the team which (with our mediators) gained over \$43 million in Third-Party settlements for

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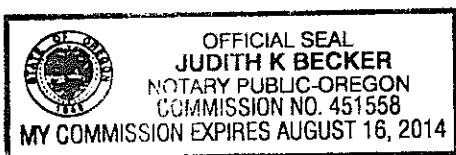
the benefit of Sunwest Investors, I respectfully suggest our Firm contributed significantly to the group effort and helped achieve a result far greater than our incurred fees and expenses.

DATED: December 17th, 2010.



Gary I. Grenley, OSB #754380

Subscribed and sworn to before me on the above date.





Notary Public for Oregon
Commission expires: 8/16/14

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **AFFIDAVIT OF GARY I. GRENLEY IN SUPPORT OF STATEMENT FOR ATTORNEY FEES AND COST BILL FOR SUNWEST INVESTORS / THIRD-PARTY CLAIMANTS** was served on all "ECF" participants through the Court's Case Management/Electronic Case File system on the date set forth below.

In addition, I served the foregoing on the parties indicated as "Non-ECF" on the attached List of interested Parties by mailing a copy thereof in a sealed, first-class postage prepaid envelope, addressed to each party's last-known address and depositing in the U.S. mail at Portland, Oregon on the date set forth below.

DATED: December 20, 2010.

GRENLEY, ROTENBERG, EVANS,
BRAGG & BODIE, P.C.

/s/ Gary I. Grenley

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Of Attorneys for Third-Party Claimants